THE CENTRAL LAW JOURNAL.

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Current Topics.

Unless we are mistaken, the bar and the public will not rest satisfied with the perfunctory manner in which the coroner of St. Louis county performed his duty in viewing the body of the late Judge Knight. It seems that the coroner did not summon a jury to investigate the case, but simply viewed the body and recorded the following as his own verdict: "Death at his residence in his bed-room at about 7 o'clock A. M., November 25th, 1876, from the effect of a pistol shot wound in the right side of his chest; and that the said pistol shot wound was the result of a ball discharged from a pistol in his hands, discharged by himself, at about 9 o'clock A. M., November 25th, 1876 in his bed-room, at his residence, before the deceased had arisen from his bed." We do not think a mere examination by the coroner, and a verdict of this kind, satisfies the requirements of law. When a distinguished citizen, who, so far as the public can see, had no motive whatever for committing suicide, is found shot in his bed at such an unusual hour in the morning, the law will not be satisfied without something more than the mere opinion of a medical officer, based upon what was told him by the inmates of the house. The matter requires the most searching examination. Judge Knight might have shot himself, and some one else might have shot him; and under all the circumstances of the case, the hypothesis of suicide is not at all clear, and those who were acquainted with him most intimately will find it very difficult to believe that he came to his end in this way.

It is creditable to journalism that even in times of great politial excitement like the present, there are journals, strongly partizan in their general policy, which yet have enough robust honesty to repudiate a palpable party fraud. In the 3rd Congressional District of St. Louis, the contest has been extremely close, and the democratic nominee has been counted in by one majority. This majority has been obtained, however, by a forgery in changing the figure "7" in the returns of one election precinct, to the figure "9." Notwithstanding the fact that the evidence was indisputable, the canvassing officers decided that they could not go into the question, but were obliged to accept the returns as they found them, and even preparing to give the certificate to Mr. Frost, when they were stayed by proceedings in one of the courts. We are glad now to notice that the *Anzeiger des Westens*, a German democratic paper, has the justice to use language with reference to this fraud of which the following is a translation: "From the facts and proofs in the case, Mr. Metcalfe is elected to Congress, by a majority of twenty-five, to represent the Third Congressional District. He is justly entitled to the certificate of election, as we have repeatedly demanded that it be given him."

We are glad also to note that the St. Louis *Republican* which although some four years ago it occupied the *role* of an independent journal, has been in this campaign strongly partisan for Mr. Tilden and the Democratic nominees,—has the justice, after stating fairly the facts of the case, to declare that "Col. Metcalfe on the face of the returns delivered to the county clerk, is the Congressman elect from the 3d district, and we believe that every fair minded man will say he ought to have the certificate."

Mr. Frost, his competitor, is a young man of good family and good character, and if declared elected, he will be barely old enough to take his seat on the 5th of March, next. His ample fortune enables him to enter politics thus early in life, without the necessity of devoting himself to the practice of his profession in order to make a livelihood. If his friends do not advise him that he can not afford to commence his political career in this way, then he is in the hands of bad advisers, and has reason to entreat salvation from his friends. The case appears to be one of blunt, palpable forgery—"base, common and popular,"—made upon the election returns of one of the precincts after they were sent into the office of the county court clerk. As a legal question, therefore, there can be no dispute that Col. Metcalfe should receive the certificate of election and that if any facts exist behind the election, as charged to exist, in regard to the manner in which votes have been obtained, they should be brought to light by an investigation before the only tribunal which has jurisdiction to hear and determine a contest—the house of representatives.

Since writing the above, the decision of the court, upon the application for a peremptory writ of *mandamus*, requiring the county clerk and justices, to cast up the vote as it originally stood, has been announced in favor of the petitioner. The ruling of Judge Lindley has been made after a patient hearing of the testimony, and a careful consideration of the law bearing upon the case. That his decision is correct, there can hardly be a doubt. We have heard something said of an appeal being taken; but we should think that after the evidence which has been adduced during the enquiry, the defeated parties would hesitate before taking such a course. A great crime has been proved, and it can not be covered by a quibble.

An item of news not without interest to lawyers is found in the fact that the United States Circuit Court for the District of Indiana, has appointed two receivers for the Ohio and Mississippi Railroad. The order practically places the administration of the railroad under the control of that court, which is, for the most part, presided over by the Hon. W. Q. Gresham, district judge. The property thus committed to the administrative control of this court is one of no inconsiderable dimensions. The railroad extends from St. Louis to Cincinnati. Its bonded indebtedness is said to be more than $13,000,000, and its floating debt about $1.000,000. We are not in possession of the facts relative to the nature of the litigation, but we assume that it is, in this case, as in most others —a bill in equity by bondholders to foreclose their lien, and receivers appointed, *pendente lite*, at their instance. The effect of the foreclosure of the mortgage covering the entire property of a railroad company, is to wipe out all the floating debts of such company, and to render entirely valueless the stock of the corporation. The purchasers at the foreclosure sale take the property entirely disburdened of anything except liens which have preference in point of time or in point of law, (as in the case of the lien of taxes), to the mortgage under which the property is sold. This railroad company has a good many creditors in St. Louis, particularly those who have furnished material and supplies for its operation within a recent period, and a good deal of interest is manifested as to what the order of the court will be in regard to the payment of such claims. It may be stated generally that such claims, unless of a very recent date, are not, in suits of this kind, paid, for the reason that they are simply floating debts of the railroad corporation, and it would be inequitable to prefer them before the security of the bondholders. Still, where the courts exercise the extraordinary power of taking into their hands by means of receivers, a railroad, and admin-

istering for an indefinite time so great a property, they sometimes refuse to do it, except on the condition that certain claims which stand upon a footing of very high merit, shall be paid. Among the claims are the arrearages of wages due to employees, and supplies very recently furnished, the accounts of which, owing to the system of accounting in the auditor's office of a great railway company, are always at least a month in arrears. The courts sometimes go back three or four months, in the payment of these supply claims, treating them as liens by analogy to the doctrines of liens in admiralty. But just how far back the courts will go, depends to a very great extent, upon the length of the chancellor's foot. In fact it is difficult to find any substantial legal or equitable ground which will warrant the payment of any floating debt contracted prior to the day when the receivers took possession. Since writing the above, we have ascertained that the order appointing the receivers provided for the payment of all debts of the company which accrued within four months previous to such appointment.

On Saturday last, the people of St. Louis and particularly the members of the bar were greatly shocked by the news that the Hon. James K. Knight, one of the judges of our circuit court, had committed suicide. Judge Knight, resided at a country villa overlooking the Mississippi river, a few miles south of St. Louis. About seven o'clock in the morning, the report of a pistol was heard, and one of the inmates of the house entering the room found it filled with smoke and the judge lying in bed, shot through the chest, and mortally wounded. The pistol used was a large Colt's navy revolver, which the judge was in the habit of keeping in a holster within reach of his bed in the room within which he slept, and the circumstances would seem to point to the fact that it was a case of suicide, although he is reported to have stated to one of the attendants of the house before death took place, that it was an accident. He died at twenty minutes after nine o'clock, about two hours after the shooting took place.

Although the community seems generally to have accepted the conclusion that it was a case of suicide, yet the question is involved in very great doubt and perplexity. Judge Knight was a man of sound mind, of even and cheerful temper, and robust in health. He had been a candidate for re-election to the bench at the late election, but was defeated with the rest of his party ticket. His defeat did not seem to disturb at all his cheerfulness or equanimity of temper. Before he went on the bench some years, ago he had a large and lucrative practice, and he had no doubt of being able speedily to recover it. On Friday, the last day of his life, he held court as usual, at noon lunched with some friends, and manifested a very cheerful temper. On the same day he called upon an old friend, a prominent citizen, with the view of arranging a hunting excursion. He also purchased on the same day a large number of commutation railway tickets, which he was in the habit of using in passing back and forth between his home and the city. These circumstances would seem to indicate that if it was a case of suicide, the resolution must have seized him very suddenly, and at a most unusual hour; for after a nights sleep men, as a rule, feel much more disposed to face the world than to retreat from it. He had, however, a few days before his death been the victim of a shameless attack in an unscrupulous daily journal, whose editor had formerly been a suitor in his court. Of course his official position prohibited him from making any reply; and although it did not seem to disturb his temper, yet to a few intimate friends, it was known to have caused him considerable mental pain. He also had some reason, perhaps, to feel keenly "the ingratitude of republics;" for he had served faithfully upon the bench for a number of years, and had twice been re-elected by the partiality of his fellow citizens, although the political party to which he belonged was not in the ascendency. At the last election, however, party lines were closely drawn; the opposing party nominated very respectable candidates for judges, and he consequently was defeated.

Judge Knight was born in Oneida County New York, was reared in Schoolcraft, Kalamazoo County, Michigan, where his father, aged 87 years, and his four brothers, still reside. He was educated at the university of the state of Michigan, and came to St. Louis some twenty years ago, where he practiced law until his appointment to the bench, which took place about eight years ago. He was a bachelor, and was at the time of his death 47 years of age.

A Word to Merchants.

Eastern capitalists are in the habit of finding a great deal of fault with western lawyers, on account of the unsatisfactory manner in which they handle claims placed in their hands for collection. It is believed that a careful examination of the matter in the light of experience and of business principles, will show that in most cases the clients are more at fault than the attorneys. In the first place, a great many meritorious claims are lost by being placed in the hands of incompetent, negligent or dishonest legal agents. It is true that it is not possible in all cases, especially where the matter is urgent and the time short, to ascertain what lawyers in a distant town or city can be trusted, and what can not. But, nevertheless, it is true that while the legal profession is undoubtely infested, as every other profession is, with its quacks, who pass under the various denominations of "pettifoggers," "shysters," "curb-stone lawyers," "jack-leg lawyers," and the like—yet the fact remains that the great bulk of the profession are honest and capable. Judas betrayed Christ, and Peter denied him; but there is no difficulty in identifying the ten worthy apostles. So, with reference to the legal profession: there is no difficulty in discriminating between the honest, capable and diligent lawyers, and the dishonest, incapable and negligent ones, provided the nature of the business will allow a little time for correspondence and enquiry. The second point where merchant creditors are greatly at fault is this: They are too much in the habit of extending time to delinquent debtors. They grant extension after extension without taking security for their debt; and when they do place the claim in the hands of a lawyer and instruct him to sue, it too frequently happens that it is too late. Local creditors, more diligent or more cunning, have succeeded in absorbing all the property the debtor has, in securing their own debts; and the foreign merchant finds, too late, that he is a victim of the operation of the old maxim, *vigilantibus non dormientibus leges subveniunt*. "Strike while the iron is hot," is the Saxon and business-like expression of the same maxim. Strike while the iron is hot, and keep the iron at white heat by constant striking. If merchants would lay this maxim diligently to their souls and act upon it, they would not have to make so many complaints of their western legal correspondents. We could cite, within the range of our experience and enquiry, many instances where eastern merchants doing business in the west have lost large sums by their own negligent and too confiding indulgence of their creditors, and in which they have not failed to lay the blame on their attorneys, who have done all that men could do to secure their debts. It is precisely parallel to the case of a man who does not call in the doctor, until the disease has so far progressed as to be past the reach of medical skill. The moral of it all is, that when a merchant puts a claim in the hands of a lawyer, he should send but one instruction—"collect or secure my debt; grant no indulgence, but make by claim; use your own discretion; push things." Remember that an at-

tachment commenced and levied secures a lien which will be preserved in a court of bankruptcy, and so of the levy on an execution. Every day's delay diminishes the probabilities of making the debt. Whenever a man promises and fails, his creditor should act up to the maxim of the Scottish chieftain:

"The flighty purpose never is o'ertook,
Unless the deed go with it: From this moment
The very firstlings of my heart shall be
The firstlings of my hand. And even now
To crown my thoughts with acts, be it thought and done."

If merchants will take to their hearts these two bits of homely advice,—first, be careful to select good lawyers, and lawyers who are not so overburdened with work that they have no time to attend to their client's interests; secondly, urge your lawyers to push your claim to a settlement or secure it,—there would be less complaint on the part of merchants who give credit in the west, both against creditors and against lawyers.

Ourselves.

A recent issue of the *St. Louis Republican* contains the following communication:

MR. EDITOR—The CENTRAL LAW JOURNAL publishes in full the opinion recently delivered by Judge Wagner in the case of Hamilton v. Marks, and justly eulogizes the accustomed ability of that eminent jurist, while it seems to suggest that his conclusions are as novel as they are unassailable. Yet the St. Louis Court of Appeals, more than six months ago, in the case of Franklin Savings Institution v. Heinzman, (Judge Lewis delivering the opinion), reached precisely the same conclusions, upon a review and analysis of the same authorities, and by substantially the same course of reasoning. The opinion was published in the city papers, and was also considered a very able one; but the CENTRAL never found it out. Perhaps that journal would be more useful to the St. Louis bar if it would oftener understand what it going on near home. LAWYER.

If the learned jurist who wrote the above had ever tried his hand at legal journalism, he would discover that usefulness to the bar of a single city will neither run a legal journal, nor keep the wolf from the door of the editor or printer. When the CENTRAL LAW JOURNAL began its career, there was a legal publication in St. Louis which devoted itself to the printing of local decisions, and which endeavored to make itself specially "useful to the St. Louis bar." It lasted three weeks after the CENTRAL LAW JOURNAL entered the field. The *Republican's* learned corespondent may not be afflicted with *ignorantia legis*, but he evidently is troubled with *ignorantia factorum*, and his advice is good for the undertaker. It never occurred to him that, although the St. Louis Court of Appeals is a very able and learned court, there is this misfortune attending its decisions: First, it has no final jurisdiction above the sum of $2,500; secondly, it has no final jurisdiction in any capital case; thirdly, it has no final jurisdiction upon any question of constitutional law; and fourthly, its decisions within its jurisdiction, although they may be the law, are yet the law only in four counties in the State of Missouri. Therefore, they are not important to any very considerable number of readers of the CENTRAL LAW JOURNAL. Although our readers in other states will justify us in printing a limited number of them, yet whenever we spread them on too thickly they do not hesitate to cry "hold, enough!" If the *Republican's* correspondent thinks he can run a journal on which the printer's bills will amount to $10,000 a year, exclusively upon local patronage, we respectfully notify him that the field is open to him: we will give way. If he will start a journal devoted to the printing of the decisions of the St. Louis Court of Appeals and of other local courts, we will guarantee not to print one of them so long as his journal survives, and our readers at large will not blame us for it, either. We do not want to be understood, however, as disparaging in the least degree the valuable judgments rendered by the St. Louis Court of Appeals. That court is unquestionably composed of able judges, who have the assistance of an able bar, and access to a complete library of English, Irish, Scotch, Canadian and American law books. Candid men, will, however, easily see the difficulties of our position. First, we can not be everywhere and know what is taking place in every court, nor can we read every newspaper that is published. Secondly, the space at our disposal will not enable us to publish every valuable decision that is rendered in the various courts of the country, nor one out of ten, nor perhaps one out of a hundred. For the decisions which we do publish we are obliged to rely for the most part upon the judges of the particular courts in which the decisions are pronounced. If whenever any decision is rendered in any court, which deserves immediate publication for the information of the public and of the legal profession, the judges of the court pronouncing the decision would notify us of that fact, we might be able to furnish our readers with a better class of decisions than we now do. But the JOURNAL can not, in the third year of its existence, go to the expense of keeping an eye and an ear upon every court in the country; and as our support comes from every state and territory in the Union, it is unreasonable to expect that we should devote undue attention to the local courts, and we shall not do it.

Declarations of Life-Insured—When Admissible in Evidence in Suit on Wife's Policy.

In a recent number of this journal (vol. 3, p. 715) reference is made to the case of Wilson v. Life Association of America, lately decided in the United States Circuit Court in Missouri, upon the proposition that the declarations of the insured husband, made after the date of the policy, as to his health existing, or matters of private history occurring, prior to the date of the policy, are not admissible as evidence in a suit by the wife upon her policy. It is there stated that the same question was similarly decided in Evers v. Life Association of America, 59 Mo. 429. This statement is not quite accurate as to the point decided in the Evers case. The policies in that case were on the life of one Clark—and the beneficiary (who alone sued) was Evers, as trustee for two married women. The declarations of Clark in his lifetime, respecting his past habits and life, but not made in the presence of Evers or his *cestuis que trust*, were held inadmissible in evidence, on the ground alone that during the continuance of Clark's life there was no joint interest in the policies between him and the other parties, their interest not legally taking effect until his interest ceased by his death; and that, to render the admission of one party receivable against another, a joint interest between them must be established, citing 1 Genl, Ev. § 176, to the effect that "it is a joint interest, and not a mere community of interest that renders such admissions receivable."

The decision of Judge Treat in the Wilson case is not, however, without precedents. The precise point arose in Fraternal Mut. L. I. Co. v. Applegate, 7 Ohio St. Rep. 292. There (similarly to the Wilson case) the application was signed "Henrietta Applegate *per* H. S. Applegate." It was first determined that, under the statutes of Ohio, the policy was the property of the wife alone, as a *feme sole*. The conclusion was then reached, that the admission of Applegate, the husband, during negotiations made and prosecuted by him for a surrender of the policy to the company, in relation to the condition of his health prior to the date of the policy,—and for the purpose of contradicting the statements made in the application—were not receivable. The court said: "There is no direct evidence in the case that Applegate, in the surrender of his wife's policy, or in the negotiations which pre-

ceded this arrangement, acted as the authorized agent of Mrs. Applegate. It is not shown that she had knowledge of the transaction at the time, or ratified it afterwards. The surrender was made in writing by Henry S. Applegate in his own name. He did not even profess, as in the taking out of the policy, to be acting as the agent of his wife . . . . . The statements in question, then, are the declarations of a stranger, one who is neither a party to the suit, nor was, at the time of making them, acting as the agent of a party. They are not the declarations of a sick person in relation to his condition at the time of making them, for they relate to transactions, and a state of facts, long past. They were not admissions against interest, for they could injuriously affect only the wife's separate property. They were not the statements of one who had been a witness on the trial, offered to impeach his credit,—but were offered and excluded merely as proof of the facts claimed to have been thus stated. It may be true that these facts were the declarations of the person who best knew the facts of the case; but whatever *weight* this consideration might properly give to competent evidence, it can not remove the objection to its competency."

The rule thus clearly and plainly laid down by the Supreme Court of Ohio, was followed and applied by the Supreme Court of Tennessee, in Southern Life Ins. Co. v. Booker, reported in 1 Western Ins. R. p. 96. In the delivery and acceptance of the policy, Booker had acted as the agent of his wife. But in Tennessee, as in Ohio, the wife's policy is her separate property. Therefore "the declarations or admissions of Booker, made after the delivery of the policy, as to what had occurred at the making of the original contract, and also the offer to prove that Booker had subsequently agreed to surrender and abandon the policy of his wife, were properly rejected."

Similar to this was the ruling in Rawls v. American L. I. Co., 27 N. Y., p. 290. One Fish had taken a policy on his own life, payable to Rawls. An offer of the defendant insurer to prove statements of Fish, made after the issuance and delivery of the policy, in relation to his habits of life, was overruled. The court said: "Fish was not, after the issuing to the plaintiff of the policy in suit, a party in interest in that contract, and could make no statement or admission that would divest the rights of the plaintiff. He was not, in any manner, the agent of the plaintiff after the issuing of the policy, and so could not bind him."

If the decision of Judge Treat in the Wilson case is based upon principles applicable to the law of agency, it is in accord with the cases above cited. J. O. P.

When Equity will Rescind Contract on Account of Mistake of Fact.

The case of *Grymes v. Sanders et al.*, decided by the United States Supreme Court, during the present term, contains an exhaustive review of the cases, and principles which govern, on this point. The bill was filed by the defendants in error for the rescission of a contract on the ground of fraud. Appellant owned two tracts of land which were separated by intervening tracts of gold-bearing lands formerly owned by him. The lands supposed to be valuable on account of containing gold, were offered for sale through a land agent. The assignor of appellees sent an agent to examine the lands, which he did under the conduct of one living near by, who was detailed for that purpose by appellees. This person took the agent to an abandoned shaft, supposed to be on the lands, and an examination was made of the quartz and debris lying about the shaft. Conversation was afterwards had in relation to the property between the agent and appellant. The agent returned to his principal and reported favorably, and stated that the abandoned shaft was on the premises. The result was a sale and the payment of a part of the purchase-money, and the occupation of the premises in April, 1866, for the vendees. Upon investigating the boundary of the lands, which was done in the month of July following, by the transferee of the vendee, it was found that the shaft was not in them, and the appellant claimed that he had never represented it to be. In September, 1866, and again in 1867, a demand was made upon appellant for a return of the purchase-money paid, on the ground of mistake. The appellant replied that he had parted with the money. He promised to reflect on the subject, and address appellees by letter, which he did. This bill was filed on the 21st of March, 1868.

The court, in passing upon the case, say that a mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied, that but for the mistake, the complainant would not have assumed the obligation from which he seeks to be relieved. Kerr on Mistake and Fraud, 408; Trigg v. Read, 5 Humph. 529; Jennings v. Broughton, 17 Beav. 541; Thompson v. Jackson, 3 Rand. 507; Harrod's Heirs v. Cowan, Hardin's Rep. 543; Hill v. Bush, 19 Barb. (Ark.) 522; Jouzan v. Toulmin, 9 Ala. 662., and considered that the case at bar did not come within this rule. Mistake, to be available in equity, must not have arisen from negligence, when the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person." Kerr on Fraud and Mistake, 407. In Manser v. Davis, 6 Ves. 678, the complainant, being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. The mistake there, as here, was the result of the want of proper diligence. See, also, Seton v. Slade, 7 Ves. 269; 2 Kent's Com. 485; 1 Story's Eq. §§ 146 and 147; Atwood v. Small, 6 Clark & Fin. 338; Jennings v. Broughton, 17 Beav. 141; Campbell v. Ingilby, 1 De Gex & Jones, 405; Garrett v. Burleson, 25 Tex. 44; Warner v. Daniels *et al.* 1 Woodb. & M. 91; Ferson v. Sanger, Id. 139; Lamb v. Harris, 8 Ga. 546; Trigg v. Read, 5 Humph. 529; Haywood v. Cope, 25 Beav. 143.

Where a party desires to rescind, upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. Thomas v. Bartow, 48 N. Y. 200: Flint v. Wood, 9 Hare, 622; Jennings v. Broughton, 5 De G. M. & G. 139; Lloyd v. Brewster, 4 Paige, 537; Saratoga & S. R. R. Co. v. Rowe, 24 Wend. 74; Minturn v. Main, 3 Seld. 220; 7 Rob. Prac. ch. 25, § 2, p. 432; Campbell v. Flemming, 1 Adolph. & E. 41; Sugd. on Vend., 14th ed. 335; Diman v. Providence, W. & B. R. R. Co. 5 R. I. 130. A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this can not be done, it will give such relief only where the clearest and strongest equity imperatively demands it. "Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and can not conveniently restore it. The imperfect and abortive exploration made by Bowman has injured the credit of the property. Times have since changed.

There is less demand for such property, and it has fallen largely in market value. Under these circumstances, the loss ought not to be borne by the appellants." Hunt v. Silk, 5 East, 452; Minturn v. Main, 3 Seld. 227; Okill v. Whittaker, 2 Phill. 340; Brisbane v. Davies, 5 Taunt. 144; Andrews v. Hancock, 1 Brod. & Bing. 37; Skyring v. Greenwood, 4 Barn. & Cr. 289; Jennings v. Broughton, 5 DeG., M. & G. 139. "The parties, in dealing with the property in question, stood upon a footing of equality. They judged and acted respectively for themselves. The contract was deliberately entered into on both sides. The appellant guaranteed the title, and nothing more. The appellees assumed the payment of the purchase-money. There was neither obligation nor liability on either side beyond what was expressly stipulated. If the property had proved unexpectedly to be of inestimable value, the appellant could have no further or other claim. If entirely worthless, the appellees assumed the risk, and must take the consequences." Segur v. Tingley, 11 Conn 142; Haywood v. Cope, 25 Beav. 140; Jennings v. Broughton, 17 id. 232; Atwood v. Small, 6 Clark & Fin. 497; Marvin v. Bennett, 8 Paige, 321: Thomas v. Bartow, 48 N. Y. 198; Hunter v. Goudy, 1 Hamm. 451; Hallis v. Thompson, 1 Smedes & M. 481.

The Publication of Legal Notices.

The Supreme Court of Illinois, in the case of Kerr v. Hitt, 75 Ill. 51, has decided that a weekly journal devoted to the dissemination of legal intelligence is a "newspaper," within the meaning of a statute of that state which relates to the publication of legal notices, following and quoting the case of Kellogg v. Carrico, 47 Mo. 157, where the same point was ruled in the same way. The question arose in relation to the validity of the publication of a notice in the *Chicago Legal News*, a well-known weekly law journal of wide circulation. The views of the court upon the question may be of sufficient interest to the legal professsion, to warrant us in quoting them entire. They are as follows, Scott, J., delivering the opinion:

The statute requires that notice of the filing of the petition in this class of cases shall be given to all known defendants, and "all whom it may concern," by publication in some "newspaper," which notice shall be entitled "Land title notice," and shall be published once a week for four weeks successively; each publication to be in some newspaper. By the 12th section it is made the duty of the clerk to advertise for bids for publishing such notices, and the judge or judges in the courts where the proceedings are had shall award the printing to the newspaper making the lowest bid therefor. All publications, provided for under the act, are to be made in the newspaper designated. In this instance, publication of notice of filing the petition was made in the *Chicago Legal News*, a journal of legal intelligence, containing decisions of federal and state supreme courts, legal information and general news. No complaint is made that this paper had not been selected in the mode prescribed in the statute, but the objection is, it is not a newspaper, in the sense in which that word is used in the statute.

The statutory definition of a newspaper in which legal notices may be published, unless otherwise provided by contract, is two-fold, that is, it shall be a secular newspaper of general circulation, or some paper specially authorized by law to publish legal notices. R. S. 1874, p. 723, see 5. Any notice published in a paper coming within either definition is legal.

The "*Chicago Legal News*" is published in the city of Chicago, a the county where this proceeding was commenced, is published once in week, is devoted principally to the dissemination of legal intelligence, but makes reference to passing events, contains advertisements, brief notices of legislative, personal and political items of interest to the general reader as well as the legal profession. Thus it will be seen it comes substantially at least within the definition given by lexicographers of a newspaper. It is none the less a newspaper because its chief object is the publication of legal news. Many newspapers published in this and other countries are devoted chiefly to special interests, such as religious and political newspapers, others devoted exclusively to literature, that contain advertisements, news items, personal and political, brief notices of matters of special public concern, and reference to proceedings of legislative and other public bodies. So it is with this journal. Besides legal, it contains other items of news, not only connected with the bench and bar, but others of a general interest. It is that class of journal that will circulate among lawyers, real estate and other business men, for it contains information in regard to sales of real estate, whether under judicial process or under powers. Accordingly its advertising columns contain notices of sales under trust deeds, on execution, judicial sales under decrees of court, and all manner of notices of legal transactions, as well as a limited number of other advertisements usually found in a newspaper of general circulation.

In *Kellog v. Carrico*, 47 Mo. 157, it was held the "*Legal Record and Advertiser*," a journal devoted to the dissemination of legal intelligence, was a newspaper, and that publication in it imparted notice of a sale under a trust deed. The court in its reasoning said, "It is not the particular kind of intelligence published that constitutes one publication a newspaper rather than another."

The "*Legal News*" is published by an incorporated company created by an act of the legislature, approved February 27, 1869. By the second section it is declared, "the primary object of the company shall be to publish the '*Chicago Legal News*' a weekly newspaper in the city of Chicago, State of Illinois, devoted mainly to legal matters." The fifth section provides, "any notice or advertisement required by law or the order of any court to be published in any newspaper, shall be as good and valid if published in the '*Chicago Legal News*' as in any newspaper."

A public law approved March 27, 1869, made it the duty of the secretary of state to furnish the "Chicago Legal News Company," publishing a newspaper called the "*Chicago Legal News*" copies of public laws to be printed and published in that journal.

These several acts of the general assembly may be regarded as a legislative construction, and recognition of the fact, that the "*Chicago Legal News*" is a newspaper in the sense that term is used in the statute. The law-making power must have so understood it, and since then it has been so recognized by the courts, both federal and state, held in Cook county, and quite generally by the legal profession and others engaged in the transaction of legal business. Since the passage of the act incorporating the "Chicago Legal News Company," it has been the constant practice to publish in that paper, legal notices required by law or the order of courts to be published, notices of sales under deeds of trust, notices to non-resident defendants in chancery, and indeed all legal notices required by law to be published in a newspaper. Should we now hold such notices illegal because the "*Legal News*" is not a newspaper, it would unsettle the title to real property of immense value, and work incalculable mischief. Judicial sales, proceedings against non-resident defendants in chancery, proceedings in attachment, sales under deeds of trust and other legal proceedings, would be rendered invalid by such a decision. Generally the legal profession and the judiciary have recognized this mode of making publication of notices required by law to be made, as valid as if made in any other newspaper. The legislature declared they should be, and the consequences of a different conclusion would be most disastrous to parties interested.

Independently of the question whether the special acts authorizing publication of legal notices in the "*Chicago Legal News*," have been repealed by subsequent legislation of the constitution of 1870, there have been so many recognitions by the legislature, that the "*Chicago Legal News*" is a newspaper within the sense in which that term is used in the statute, and that construction has been so long and so generally acquiesced in and acted upon by the bar and the courts, that we are not at liberty to adopt any other.

But another view is, if the courts of Cook county, under authority conferred by general law, have settled and designated the "*Chicago Legal News*," as the paper in which "land title notices" shall be published, then it would seem to follow in the language of the statute, it is "a paper especially authorized by law to publish legal notices," and hence a notice published in it would be legal as coming within the second branch of the definition given in the statute, of a newspaper in which it is lawful to make publication.

This decision, in connection with the Missouri case, would seem to place the question beyond doubt; and it may be added that the views of the Illinois and Missouri courts derive support from the practice of the bar in other states, which has become very general, where weekly law journals are published. Nearly all these journals carry large lists of legal advertisements, and the same is true of the *Irish Law Times*, and some other foreign law journals. These journals are in fact rapidly becoming favorite media for the communication of legal notices to the public. In addition to the *Chicago Legal News*, which carries twelve pages of this kind of matter, we instance the *Pacific Law Reporter*, the Philadelphia *Legal Intellegencer*, the Philadelphia *Legal Gazette*, the *Pittsburg Legal Journal*, the *Washington Law Reporter*, the New York *Daily Register*, and several others, all of which carry considerable lists of legal notices.

—In Michigan, a constitutional amendment increasing the salaries of circuit judges from $1,500 to $2,500 per annum, has been adopted by a small majority, in a total vote of nearly one hundred and fifty thousand. The same proposition had been, we believe, previously defeated at the polls.

Bankruptcy — Effect of Agreement not to Record Mortgage, on the Rights of the Assignee.

HARRIS, ASSIGNEE v. EXCHANGE NATIONAL BANK OF COLUMBIA.

United States Circuit Court, Western District of Missouri, November Term, 1876.

Before Hon. JOHN F. DILLON, Circuit Judge.

A deed of trust intended to give a creditor a preference fraudulent under the bankrupt act, was executed more than four months before the commencement of proceedings in bankruptcy against the grantor therein; in order to prevent the knowledge thereof from coming to other creditors, and to have it validated by lapse of time, the grantor and beneficiary agreed that it should be kept off the record; after the lapse of four months from the date of the deed of trust, but within four months of the filing of the petition in bankruptcy, the instrument was deposited for record. *Held*, on a bill in equity, filed by the assignee in bankruptcy against the beneficiary to set aside the deed of trust, that the suit was not barred because the proceedings in bankruptcy were commenced more than four months after the execution of the deed of trust.

Appeal from a decree of the District Court. The material facts appear in the opinion.

Henry Flanagan for the complainant (appellee); *Lay & Belch* for the defendant (appellant).

DILLON, Circuit Judge.—This is a bill in equity to set aside a deed of trust made by the bankrupt, Bass, for the benefit of the defendant bank and others, to secure about $26,000. The deed of trust was executed June 14, 1873. It contains an endorsement by the recorder that it was filed for record October 15, 1873, but it is shown by the proofs *aliunde* that it was not actually spread at large on the records until between December 10 and 17, 1873. On the 20th day of February, 1874, an involuntary petition in bankruptcy was filed against Bass, and he was adjudged a bankrupt on the same day.

This suit was brought by the assignee in bankruptcy on the 17th day of June, 1874; and the bill, as amended, seeks to set aside the deed of trust on two grounds: 1st, because it is fraudulent under the bankrupt act; 2d, because it was actually fraudulent, being made to hinder and delay creditors.

I think there is no sufficient evidence to overturn the conveyance on the second ground.

As to the first ground, I am of opinion that the proofs show that Bass was insolvent when the deed of trust was made, that the bank knew, or had reasonable cause to know this fact, and that it intended to secure a preference in contravention of the bankrupt act. I am further of opinion that at the time it was taken it was agreed that it should not be recorded, but should be kept secret until four or six months from its date should elapse within which it could be attacked under the bankrupt act. Pursuant to this agreement, the bank did not deposit the instrument for record until October 15 (four months and one day), and the evidence tends to show that, out of favor to the bank, the instrument was not actually registered until about the middle of December, just six months after its execution, the officers of the bank being uncertain whether four or six months was the limit. The petition in bankruptcy was filed within four months after the deed of trust was deposited with the recorder.

It is now insisted by the bank that, inasmuch as the deed of trust was executed and delivered more than six months before the proceedings in bankruptcy, it is too late to assail it on the ground that it was made in contravention of the bankrupt act. In support of this position it is maintained that the deed took effect from the date of its execution, and not from the time it was filed for record or recorded. Gibson v. Warden, 14 Wallace, 244; *In re* Wynne, 4 Bankr. Reg. 5; Sawyer v. Turpin, U. S. Sup. Court, Oct. T. 1875; Cragin v. Carmichaci, 2 Dillon, 520.

When the question is not controlled by statutable provision, this is a sound general proposition. But it would be against principle and sound policy and even shock the moral sense, to allow a creditor, pursuant to an understanding with his debtor, purposely to conceal from other creditors the existence of an instrument which is a fraud upon their legal rights, and for this purpose keep it off the records, to insist that the statute commences to run from the date of the execution of the instrument.

Under the circumstances of the case, I am of opinion that the four months limitation did not begin at least until the 15th day of October (when the deed was filed for record), which was less than four months before the commencement of the proceedings in bankruptcy. This conclusion is supported by many cases, analogous in principle, which courts of equity have refused to apply the bar of the statute where the fraud has been perpetrated and concealed by the party, who seeks to avail himself of the lapse of time. Hovenden v. Lord Annesley, 2 Sch. & Lefroy, 609; Bailey v. Glover, 21 Wall. 342; Hilderbrau v. Brown, 17 B. Mon. 779. The observations of Gaston, J., in Hoffner v. Irwin, 1 Iredell (Law) 490, 498–500, are very forcible, and strongly sustain the view we have taken.

It is probably a sound principle that if secrecy or an agreement or understanding not to record, for the purpose of concealing the instrument from other creditors, constitutes part of the consideration or inducement to the making of the security, this will taint the same with *mala fides* as to creditors injuriously affected thereby; but, however this may be, it will, at all events, preclude the creditor receiving such security (which is all that it is necessary here to decide) from insisting, as to such other creditors, that the instrument takes effect and becomes effectual from the date of its execution, and not from the date of its record.

This conclusion, viz: that the deeds of trust, as respects creditors, were inoperative until filed for record, is also supported by the Registry Statute of Missouri (1 Wag. Stat. secs. 24, 25, 26, p. 277), which provides that "no such instrument shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."

The decree of the district court setting aside the deed of trust is

AFFIRMED.

Accident at Railway Crossings—Negligence.

C. B. & Q. R. R. Co. v. DAMERELL.

Supreme Court of Illinois, January Term, 1876.

Hon. JOHN M. SCOTT, Chief Justice.
" P. H. WALKER,
" T. L. DICKEY,
" JOHN SCHOLFIELD,
" SIDNEY BREESE,
" B. R. SHELDON,
" ALFRED M. CRAIG, } Judges.

1. Duty of Engine Driver on Approaching Crossings.—The statute of Illinois only requires that, on approaching a crossing, the bell of the engine shall be rung or the whistle sounded, nor is it the duty of the engine driver, on reaching a crossing, to stop his train for the purpose of avoiding a collision with a team which he may see approaching.

2. Case in Judgment—Negligence — Burden of Proof.—In the case in judgment, where the evidence showed that had the driver of the team kept a lookout, he could have seen the train from the time it came out of a cut which hid it from his sight to the crossing, a distance of about sixty yards, and that he could have seen the smoke and steam of the engine before it emerged from the cut. *Held*, that the driver was guilty of want of ordinary care and prudence in going upon the crossing. *Held, further*, that in such cases the burden of proof is on the plaintiff to prove that he was exercising ordinary care and diligence at the time the accident occurred.

2. Duty of Persons at Railroad Crossings.—It is the duty of persons about to cross a railroad track to look about them, and see if there is danger, and not to go recklessly upon the track, but to take the proper precautions themselves to avoid accidents at such places. Want of such precautions has been held gross negligence. C. B. & Q. R. R. v. Van Pottan, 64 Ill 516.

SHELDON, J., delivered the opinion of the court.

These were two actions, one in the name of Emanuel, and the other in the name of Robert Damerell, as plaintiffs, to recover in damages from a collision on the railroad of the defendant. The actions were consolidated in the court below, and a verdict and judgment rendered in favor of the plaintiffs, and the defendant appeals.

The principal facts are, that on April 7th, 1875, about 10 o'clock A. M., at the railroad crossing of a public highway, between West Point and Stilwell, and one and a half miles south of West Point, a passenger train upon defendant's railroad came into collision with a team and wagon, killing two horses and a colt, destroying the harness and damaging the wagon, the property belonging in separate portions to the plaintiffs. The railroad track and highway cross each other at right angles and nearly on the same level. The track is two to three feet higher than the wagon road, with approaches on each side ten or twelve feet in length of such grade, as not to hinder a team passing over the crossing. About sixty rods north of the crossing the track enters a cut which extends north about one hundred rods. The cut is eighteen or twenty feet near its north end, and decreases in depth toward the south, and runs out to level ground at its south end. A highway runs south from West Point parallel with, and about sixty feet east of, the railroad track, and intersects a highway running east and west, and on which latter is the railroad crossing, one and a half mile south of West Point. There is a hedge on the west side of the highway running south, and on the north side of the highway running west, ending sixteen feet east of the railroad track, from six to ten feet high, and, at that time, bare of leaves. The witness, Henry Damerell, who had charge of and drove the team, dwelt in the vicinity and was well acquainted with the crossing, and knew that the passenger train going south passed the crossing at that time. He drove south on the highway from West Point and turned west toward the crossing. As the horses went on the track he looked and saw the train coming and about twenty-five yards off. He struck the horses with the lines. But before he could get the wagon on the track the collision took place, the engine striking the wagon about the doubletrees and throwing the team on one side of the track and the wagon on the other. The wind was blowing tolerably hard from the south-west. The train was about half an hour behind time, and running from twenty-eight to thirty miles an hour. It consisted of engine, tender, baggage-car, and passenger cars.

We find it necessary here to consider but one question, whether the verdict was sustained by the evidence. Appellees claim that the bell was not rung, nor the whistle sounded for the required distance before reaching the crossing. Eight witnesses on the part of the defendant testified positively that the bell was rung for the requisite distance before reach-

ing the crossing. The bell of the engine was rung by a steam attachment, and when started kept on ringing until stopped by shutting off the steam. Six witnesses on the part of the plaintiffs testified negatively that they did not hear the bell ring. The inferior character of such negative evidence has been often remarked upon and is well understood. All the evidence taken together leaves no reasonable doubt upon the mind that the bell was rung all the way from West Point, a distance of a mile and a half to the crossing. But it is said the whistle was not sounded, and that as the wind was blowing tolerably hard from the south-west, in a direction naturally calculated to carry away from the driver of the team the sound of the bell, it was the duty of the defendant to have blown the whistle. But the statute only requires that the company shall ring the bell or sound the whistle. This is the precaution which the law has prescribed that the company shall make use of on approaching the crossing, and by ringing a bell the company performs its statutory duty in this regard. The engine driver testified that he did not see the team and wagon, until the engine struck them, but as the fireman on the engine testified that when he first saw the team the train was just passing out of the cut, and the team was then about a horse's length east of the crossing, and that at that time the train could have been stopped before it reached the crossing, it is insisted that there was culpable negligence in not stopping the train, and so avoiding the collision. The cut was about sixty rods from the crossing, and the fireman had reason to suppose that there was time for the team to safely cross over in advance of the train, or that the team would stop before going upon the crossing. The fireman says that when he first saw the team east of the crossing he supposed they would stop; that in a moment he looked out again and it was crossing on the track, and he applied the air brake at once, but that the train could not then be stopped in time to avoid the collision. There was reason for the fireman supposing that the team would stop. The team and train was in full view of each other. The railroad track just before the team; the sign board over the crossing; the noise of the train, and the ringing of the bell, all warned the driver of the approaching train. The fireman might not unreasonably suppose that the driver would heed the warning and not recklessly attempt to cross the track in advance of the train. This court has frequently asserted the doctrine that it is not the duty of the engine driver on nearing a railroad crossing, to stop his train for the purpose of avoiding a collision with a wagon and team he may see approaching the crossing. St. L. A. & T. H. R. R. Co. v. Manly, 58 Ill. 300; C. B. & Q. R. R. Co. v. Lee, 68 Id. 576; T. W. W. R. R. Co. v. Jones, 76 Id. 312.

But there was here such negligence on the part of Damerell, the driver of the team, as to preclude all right of recovery. He lived in that part of the country and was well acquainted with the crossing. It was a clear morning. He drove south on the highway from West Point, and turned west into the wagon road leading to the crossing, and which crossed the railroad track at right angles. The crossing was directly in front of him, and only sixty feet distant. From the time when he turned into the wagon road, from his seat on the wagon he had a clear view of the railroad track from the crossing north (the direction from which the train came) to the south end of the cut, a distance of about sixty rods. The hedge was bare of leaves and did not obstruct the view. The evidence shows beyond question that, had the driver of the team looked, he could have seen the train from the time it came out of the cut all the way as it passed from the cut to the crossing, and that he could have seen the smoke and steam of the engine before it emerged from the cut. In the language of the witness, Henry Damerell himself, who was in the wagon driving the team: "Horses were on the track when I saw train; was driving along at the usual speed; don't know that I looked on either side for the train; did not stop horses before going on the track; don't know what made me look toward the train; just happened to look; horses then on track and train about twenty-five yards off; struck horses with the lines when I saw train; was driving in a walk when I turned corner towards crossing; did not look on either side for train as I drove on the crossing." Such was the undisputed testimony. There was here clearly the want of the exercise of ordinary care and prudence in going upon the crossing. As said by this court in The C. B. & Q. R. R. v. Hazard, 26 Ill. 373: "The books are full of cases where, in such actions as this, the burden of proof is always held to be on the plaintiff that he was himself exercising ordinary care and diligence at the time the accident happened. A. B. R. R. Co. v. Grimes, 13 Ill. 585; C. B. & Q. R. R. Co. v. Dewey, 26 Id, 255; Ill. Cent. R. R. Co. v. Simmons, 38 Id. 242; C. & A. R. R. Co. v. Gretzner, 46 Id. 74; C. & N. W. R. R. Co. v. Sweeney, 52 Ill. 325; C. B. & Q. R. R. Co. v. Patton, 64 Ill. 510; C. B. & Q. R. R. Co. v. Lee, 68 Id. 576; C. & A. R. R. Co. v. Beeker, 76 Id. 25; Wharton on Negligence, sec. 300; Sherman & Redfield on Negligence, sec. 25; Ill. Cent. R. R. Co. v. Green (decided at the September term, 1874), 2 Redfield American Railway Cases, 552, and note.

This court has repeatedly declared the doctrine that it is the duty of persons about to cross a railroad track, to look about them and see if their is danger, and not to go recklessly upon the track, but to take the proper precautions themselves to avoid accidents at such places. C. & R. I. R. R. v. Still, 19 Ill. 499; G. & C. M. R. R. Co. v. Dill, 22 Id. 265; C. & A. R. R. Co. v. Gretzner, 46 Id. 82; T. W. & W. R. R. Co. v. Riley, 47 Id. 515; St. L. A. & T. H. R. R. Co. v. Manley, 58 Id. 300; C. & A. R. R. Co. v. Jacobs, 63 Id. 179; C. B. & Q. R. R. Co. v. Lee, 68 Id. 576; T. W. & W. R. R. Co. v. Miller, 76 Id. 278; T. W. & W. R. R. Co. v. Jones, Id. 312; C. R. I. & P. R. R. Co. v. Bell, 70 Id. 102. See Penn. R. R. Co. v. Beall, 73 Penn. St. 504; Magrath v. N. Y. Cent. & Harlem River R. R. Co., 59 N. Y. 468. It was said in C. B. & Q. R. R. Co. v. Van Pottan, 64 Ill. 516, that the neglect of such precaution would be gross negligence. It is evident here that the driver of th team by the exercise of ordinary care and prudence, might have discovered and avoided the approaching train; and that he went upon the crossing heedlessly and recklessly, without using any precaution to ascertain whether or not there was a train approaching. The air brake seems to have been applied, and all reasonable means used to stop the train and avoid the injury, as soon as it became apparent that the team was coming on the track without stopping, and was in a position of actual danger. There is no room for imputing anything like intentional or wanton wrong to the employees of the company. The evidence fails to make out a case for a recovery. The judgment will be reversed and the cause remanded. REVERSED AND REMANDED.

WALKER and DICKEY, JJ., concur in the decision announced in this case, but dissent from a portion of the reasoning, and some of the rules announced.

Non-intercourse During War.

AHNERT v. ZAUN.

Supreme Court of Wisconsin, November, 1876.

HON. E. G. RYAN, Chief Justice.
" ORASMUS COLE, } Judges.
" W. P. LYON, }

Held, that the period during which the non-intercourse of war continued between the city of New Orleans and the loyal states, commenced with the President's proclamation of April 19, 1861, and ended with the occupation of that city by the federal forces on the 6th of May, 1862. After that date a resident of New Orleans was under no disability to bring an action in the courts of this state.

Jenkins, Elliott and *Winkler*, for appellant.

COLE, J., delivered the opinion of the court.

The important question in this case is, whether the plaintiff was prevented by the existence of civil war, from bringing his action in the courts of this state before the statute of limitations had run upon it. It is a fact found by the jury, that the plaintiff and his brother Ernst, were residents of the city of New Orleans during the late war of the rebellion, and that they continued to reside in that city during the war. And the learned counsel contends that in consequence of the residence of the plaintiff in that city, and his disability to sue, there should be deducted from the computation the period covered by the war, up to August 20, 1866, when the rebellion was declared to be completely suppressed and peace restored, by the proclamation of the President of that date. On the other hand, the counsel for the defendant insists that the plaintiff can claim no suspension of the statute of limitations beyond, at the utmost, the 2d day of April, 1863; and that strictly non-intercourse between New Orleans and the loyal states terminated on the 6th day of May, 1862, on the capture and occupation of the city by the United States army, at which time adverse possession under color of title began to run against the plaintiff. The consequence of the war upon the plaintiff's rights, must be ascertained and determined, if possible, from the adjudications of the Supreme Court of the United States, which we deem controlling upon the subject.

Under the authorities there is no room for doubt or argument as to the legal consequences which result from a state of war upon all contracts and existing remedies, so far as the citizens of the belligerent countries are concerned. Mr. Justice Nelson in the Prize Cases, states the doctrine as follows: "The people of the two countries became immediately the enemies of each other, all intercourse, commercial or otherwise between them became unlawful; all contracts existing at the commencement of the war suspended, and all made during its existence, utterly void." And as touching the point as to the right of a citizen of one belligerent to maintain a suit in the courts of the other, Mr. Justice Clifford in Hanger v. Abbott, 6 Wal. 532–539, remarks: "Total inability on the part of an enemy-creditor to sustain any contract in the tribunals of the other belligerent exists during the war, but the restoration of peace removes the disability and opens the doors of the courts. Absolute suspension of the right, and prohibition to exercise it, exists during war by the law of nations, and if so, then it is clear that peace can not bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitations is also suspended during the period the creditor is prohibited, by the existence of the war and the law of nations, from enforcing his claim." The court has likewise repeatedly held that the statute of limitations of the several states, did not run against the right of action of parties during the continuance of the civil war. The Protector, 9 Wall. 687; Same Case in 12 Id. 700; Levy v. Stewart, 11 Id. 244; and United States v. Wiley, Id. 508; Brown v. Hiatts, 15 Id. 177; Batesville Institute v. Kauffman, 18 Id. 152; Ross v. Jones, 22 Id. 576. And the court says, "Our civil war was accompanied by the general incidents of a war between independent nations; that the inhabitants of the Confederate States, on the one hand, and the loyal states on the other, became thereby reciprocally enemies to each other, and were liable to be so treated without reference to their individual dispositions or opinions; that during its continuance all commercial intercourse and correspondence between them, was interdicted by principles of public law as well as by express enactments of Congress; that all contracts previously made between them were suspended, and that the courts of each belligerent were closed against the other." Brown v. Hiatts, *supra*. It is not denied that this was the relation which existed

between the citizens of the loyal and disloyal states—that the war affected the condition of the entire territory of the states declared to be in a state of insurrection, except as modified by the laws of Congress or the proclamations of the President. Congress, however, authorized the President by proclamation to declare that the inhabitants of a state, or any section or part thereof where insurrection existed, were in a state of insurrection against the United States, and thereupon all commercial intercourse between the same and the citizens of the rest of the United States should cease, and be unlawful so long as such condition of hostility should continue. 5 section of Act, July 13th, 1861; 12 U. S. Stat. 257. In August, 1861, the President issued a proclamation declaring the inhabitants of certain states named, to be in a state of insurrection against the United States, excepting such parts of those states as might maintain a legal adhesion to the Union and the constitution, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents. 12 U. S. Stat. 1262. This proclamation was in force when the forces of the United States captured and occupied the city of New Orleans on the 6th of May, 1862. On the 2d of April, 1863, the President issued a new proclamation reviving his former one of August, 1861, working certain exceptions therein contained, declaring the inhabitants of the states named to be in a state of insurrection, but excepts from the operation of the proclamation certain designated parts, among which was the port of New Orleans. 13 U. S. Stat. 730.

The supreme court in cases which have come before it, has had occasion to consider and declare the legal consequences of these various acts of the political department of the government. In the case of the Schooner Venice, 2 Wall. 258, which, with a cargo of cotton, was captured in Lake Pontchartrain, Louisiana, by the United States ship of war Calhoun, on the 15th of May, 1862; was taken to Key West libelled as a prize of war in the district court, but was restored with her cargo to the claimant, Cook, who was a native British subject, and had resided and been engaged in business in New Orleans, without being naturalized as a citizen of the United States, for ten years previous to the capture. The court held that "the military occupation of the city of New Orleans by the forces of the United States, after the dispersion of the rebels from that immediate region in May, 1862, may be considered as having been substantially complete from the publication of General Butler's proclamation of the 6th of May; and that all the rights and obligations resulting from such occupation, or from the terms of the proclamation, existed from the date of that publication." The chief justice in the course of his opinion, after referring to the capture of the schooner; the occupation of the city; the proclamation of General Butler; the act of Congress of July 13, 1861, and the proclamation of the President issued in pursuance of that act, says: "The legislative and executive action related, indeed, mainly to trade and intercourse between the inhabitants of loyal and the inhabitants of insurgent parts of the country; but, by excepting districts occupied and controlled by national troops from the general prohibition of trade, it indicated the policy of the government not to regard such districts as in actual insurrection, or their inhabitants as subject, in most respects, to treatment as enemies. Military occupation and control to work this exception must be actual; that is to say, not illusory, not imperfect, not transient; but substantial, complete, and permanent. Being such, it draws after it full measure of protection to persons and property consistent with a necessary subjection to military government. It does not, indeed, restore peace, or, in all respects, former relations; but it replaces rebel by national authority, and recognizes, to some extent, the conditions and the responsibilities of national citizenship.

"The regulations of trade made under the act of 1861, were framed in accordance with this policy. As far as possible the people of such parts of the insurgent states, as came under national occupation and control, were treated as if their relations to the national government had been merely interrupted. . . . Vessels and their cargoes belonging to citizens of New Orleans, or neutrals residing there, and not affected by any attempt to run the blockade, or by any act of hostility against the United States after the publication of the proclamation, must be regarded as protected by its terms."

The decree of the district court restoring the property to its owner was affirmed. It is evident that here was a full and complete recognition of the ability of a resident of the city of New Orleans to come into a court of admiralty, to arrest and maintain his right to a vessel and cargo, which the chief justice says, "though undoubtedly, enemies property at the time she was anchored in Lake Ponchartrain, can not be regarded as remaining such after the 6th of May." The ground upon which the decision in the Venice rests is thus very clearly stated by Mr. Justice Swayne in the Ouachita Cotton Case, 6 Wall. 521-531, as follows: "The subjugation of New Orleans and the restoration of the national authority there are regarded as having become complete on the 6th of May, 1862. From that time its citizens were clothed with the same rights of property, and were subject to the same inhibitions and disabilities as to commercial intercourse with the territory declared to be in insurrection, as the inhabitants of the loyal states. Such is the result of the application of well settled principles of public law. The proclamation of the 2d of April, 1863, recognized but did not change the existing condition of things. It was the same afterwards as before. The effect of the proclamation was cumulative."

In that case the cotton was seized in April, 1864, by the naval forces of the United States on a plantation up the Ouachita river, in a part of Louisiana then, as from the origin of the rebellion, subject to the power of the confederate government. The cotton was claimed by citizens of Ohio and residents or corporations of New Orleans, who had purchased it of the rebel government after the 6th of May, 1862. The court held that "the restoration of the national authority at that date, 'fixed' upon the purchasers the same disabilities as to commercial intercourse with the territory declared to be in insurrection, as it had previously fixed upon the inhabitants of the loyal states." The purchases, therefore, were all declared illegal and void, for the reason and upon the ground that all commercial intercourse between the inhabitants of insurgent territory and inhabitants of the other states, except under the license of the President, and according to the regulations prescribed by the secretary of the treasury, was entirely prohibited. The plain doctrine of this case is, that the citizens of New Orleans were subject to the same disabilities, and sustained the same relation in respect to the inhabitants of the insurrectionary territory, as existed between those inhabitants and the citizens of other portion of the Union. In other words, the "condition of hostility," so far as the inhabitants of that city was concerned, had been removed by the operation of the President's proclamation and its capture and occupation by the United States forces. And it seems to us the logical result of all these adjudications is, that the plaintiff was under no disability to bring an action in the courts of this state in consequence of the war after May, 1862, or certainly after April, 1863. No other inference can be fairly drawn from them, and they are conclusive upon the question before us.

The counsel for the plaintiff made a point that the defence of adverse possession was not sufficiently set up in the answer, or that there was a variance between the allegations of the answer and proof. We have considered these objections but fail to see any force in them. If there was a variance it was quite immaterial. These remarks, together with what is said in Wiesner v. Zaun, 39 Wis. 188, dispose of all questions we deem it necessary to notice.

The judgment of the circuit court is reversed, and a new trial ordered.

Forfeiture of Insurance Policy for Non-Payment of Premium Note.

HULL ADMR. v. NORTHWESTERN MUTUAL LIFE INS. Co.*

Supreme Court of Wisconsin, March, 1876.

Hon. E. G. Ryan, Chief Justice.
" Orasmus Cole, } Judges.
" W. P. Lyon, }

The policy provided that in consideration of an annual cash premium of $179.55, and an annual loan note with interest of $89.75 during ten years, it assured the life of H. for the term of life; also, that a due proportion of surplus should be returned; also, that in case of default in the payment of any premium, as many tenths of the original sum insured would be paid as there had been complete annual premiums paid. But in order to secure such proportion, all premium notes must be taken up, or the interest be paid within three months after it was due, until the notes are cancelled by returns of the surplus, or the whole policy will be forfeited, unless one or more annual payments have been made in full by cash payment, or by application of the dividend. The policy was accepted upon the following, among other conditions: If the premium or the interest on any note should not be paid on or before the time specified, the company shall only be liable for such proportional part of the sum insured as provided for above. On the policy was endorsed the statement that the dividends in the case of note policies would be first applied to the unpaid interest, and then to the notes, which were non-a-sessable. 'This policy is non-forfeitable. Each complete yearly payment secures its proportion of the policy. . . . If payments of premium are at any time discontinued, this policy is full paid for an amount equal to as many proportionate parts of the original insurance as there have been complete annual premiums paid at the time of such default." The note contained a promise to pay the interest annually, or the policy should be forfeited. The policy lapsed by non-payment of the fourth annual premium. The interest on the notes amounting to $24 80, was not paid, but there was due the insured $51.15 dividend. *Held*, that the insured was entitled to have the unpaid interest offset by the dividend, and the forfeiture was limited to seven tenths of the original sum.

D. Babcock, of Fond du Lac, for Respondent. *George H. Noyes*, for Appellant.

The opinion of the court was delivered by Cole, J.

The company defends upon the ground that in consequence of the non-payment of the interest due on the notes given by the insured for premiums, the policy became forfeited. The action was to recover three tenths of the sum named in the policy, less the amount of the outstanding loan notes. The policy was on the ten year payment plan, and bore date March 29th 1870. The insured paid the stipulated part of the cash premiums for the years 1870, 1871, and 1872, and gave in each of said years his annual loan note as provided by the term of the policy. On the 26th day of March 1873, when the time of the fourth annual renewal came, the payment of the premium was changed from an annual to semi-annual payments, and it is admitted that on the 29th of September 1873, the policy lapsed as to seven tenths by reason of default in the payment of the premium then due. There is a little obscurity in the evidence upon the point, but the fact is conceded that on the 29th day of March 1874, there was due the company as interest on the outstanding loan notes the sum of $24.80. On that day there was due the insured from the company the sum of $51.15 dividend earned on the policy for the year 1872. The insured died on the 14th of December 1874. The real question presented for consideration is: Did the policy lapse and become forfeited as to the three tenths of the original amount by reason of the failure of the insured to pay the interest on the premium notes on the 29th day of March 1874, upon this state of facts? An answer to this enquiry necessarily requires a reference to

* 5 Ins. Law Journal, 828.

several clauses in the policy. In the first place the policy recites that in consideration of the representation made in the application therefor, and of the premium in advance as therein stipulated, consisting of the annual cash premium of $179.55 to be paid at or before noon on or before the 29th day of March, and of an annual loan note with interest of $89.75 (to be given in every year) during the first ten years of the continuance of the policy, the company assured the life of Alfred Hull, for the benefit of himself, in the amount of $5,000 for the term of his natural life. After a provision for the payment of the amount of the assurance when the policy matures, follow the clauses: "At each distribution of the surplus, after two years from the date hereof, a due proportion of such surplus on each and every year's business, during the continuance of this policy, will be returned to the said assured. And the said company further promises and agrees, that if default shall be made in the payment of any premium, it will pay, as above agreed, as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default. But in order to secure such proportion of the policy, all premium notes must be taken up, or the interest thereon be paid annually in cash, on the date of the annual maturity of the premium, or within three months thereafter, until the notes are canceled by returns of the surplus, or the whole policy will be forfeited, unless one or more annual payments have been made in full, by cash payment or by application of the dividend.

Among the conditions upon which the policy was issued and acceptep was this: "3d. If the said premium, or the interest upon any note given for the premiums, shall not be paid on or before the days above mentioned for the payment thereof, at the office of the company or to the agents when they produce receipt signed by the president or secretary, then, and in every such case, the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine." On the policy was endorsed this statement, with other matters not material to be noticed: "At the third annual renewal, the dividend of the first year will be due, and on cash policies can be applied *as cash* towards the payment of the third year's premium, or if the party insured is at the time in good health, may be used for purchasing full paid additional non-forfeiting insurance, due and payable with this policy at death, or temporary insurance, expiring at the end of one year, and due and payable in case of death during the year; and on note policies will be applied first to pay the unpaid interest on loan notes, and then to the notes themselves. Loan notes are not assessable, and are to be paid only by the dividends, or by deduction from the policy when it matures, if any are then outstanding. · ·

· · This policy is non-forfeitable. Each complete yearly payment secures its proportion of the policy. · · If payments of premium are at any time discontinued, this policy is full paid for ar. amount equal to as many proportionate part of the original insurance as there have been complete annual premiums paid at the time of such default.

The loan note contains a promise by the assured to pay the amount therein named with seven per cent. interest, "which interest shall be paid annually or the policy to be forfeited"—the note stating that it is given for part of the premium and is to remain a lien upon the policy until it becomes due by limitation or by the death of the assured when the note is to be deducted from the policy. Now whether there is or is not some repugnancy in these various and different clauses and stipulations above referred to is a question which we shall not stop to consider. It is sufficient to say that when they are all construed together as parts of the same transaction, as they obviously must be to ascertain the real meaning of the contract, we find no difficulty in affirming the judgment.

The scheme or plan of the policy, so far as ascertainable, is plainly opposed to an entire forfeiture and default to pay any premium falling due. For the company expressly agrees if default shall be made in the payment of any premiums, it will pay as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of each default. That this is a correct interpretation of the policy when the entire annual premium is paid in cash, is not seriously controverted. The question then is, what result follows when, as in this case, only a part of the annual premium is paid in cash and a loan note given for the residue? The counsel for the company contend that then, by the terms of the policy, a failure to pay the interest on the notes on the date of the annual maturity of the premium, or within three months thereafter, works an entire forfeiture. And they rely in support of this position upon the doctrine of those cases which hold that the obligation of the company ceases upon failure to make payments so specified in the policy. The principle of these decisions is quite familiar, but the facts of this case render it inapplicable. In the first place it will be seen that by the third condition above quoted, it is provided if the premiums, or the interest upon any note given for premiums, shall not be paid on or before the days mentioned for the payment thereof, then the company is exonerated from the payment of the whole sum assured, and is only liable for such part thereof as is expressly stipulation. If there is any conflict or repugnancy between this condition and the prior clause, that in order to secure such proportion of the policy, all premium notes must be taken up or the interest thereon be paid annually in cash on the date of the annual maturity of the premium or within three months thereafter, the condition upon obvious principles should prevail. Forfeitures are only enforced when it appears that this is the plain intent and meaning of the contract, and the rule applies that the words of an instrument shall be taken most strongly against the party employing them. But this is not all. The policy makes provision for the distribution of the surplus when earned. At the third annual renewal, the dividend of the first year was due, "and on note policies will be applied first to pay the unpaid interest on loan notes, and then to the notes themselves." Here is a clear and unqualified stipulation on the part of the company that the dividends should be appropriated on a note policy, first to the unpaid interest on the loan notes, and then to the discharge of the principal of the notes themselves. And it was the manifest duty of the company to so apply the dividend due the insured March 29th 1874, and prevent a forfeiture, if indeed by the terms of the policy a forfeiture would result from a failure to pay the interest then due on the outstanding loan notes. Under these circumstances it would be most unjust and inequitable to allow the company to prevail in its defence that the policy as to the three tenths of the original sum became forfeited for mon-payment of interest. The premium notes outstanding are made a lien upon the policy, and of course are to be deducted from the amount of the recovery. It will be seen that this is the provision made for their payment after the proper application of the dividends. For the insured in no event is bound to pay the principal of these notes, for the stipulation in reference to them is, that they "are to be paid only by dividends, or by deduction from the policy when it matures.

In answer to this view as to the rights and obligations of the parties, the counsel for the company claimed that the agreement to apply the dividends to the payment of interest on premium notes had no reference to a partially lapsed policy, but was obviously restricted to full policies. We see no warrant whatever for thus restricting the meaning of the clause. The language used is clear, unqualified, and sufficiently comprehensive to include all note policies, and there is nothing in the context which to our minds evinces an intention to exclude policies partially lapsed. Nor is this construction of the clause inconsistent or repugnant to any other provision relating to the same subject which controls it. A still further objection is urged to the construction indicated, which is, that the contract requires the interest on outstanding notes to be paid in cash, and it is said the uniform practice of the company has been to insist upon such payment in case of lapsed policies; the dividends being always applied to the discharge of the principal of the notes. Dividends due the insured are cash, and if the practice of the company has been to refuse to apply them in payment of interest on policies like this, it has simply violated its agreement. The money was in the possession of the company, and no excuse is given for its failure to make the appropriation. It is said that to entitle the insured to the dividend of $51.15 there must have been a policy in force when it came due; or in other words that the insured must have been a policy-holder. There is no occasion to controvert the correctness of this position. For if, in any event, default in the payment of the interest on the outstanding notes would work a forfeiture of the policy in the most favorable view for the company, the forfeiture would not be incurred until after the expiration of three months from the 29th of March, 1874. So that in whatever aspect the case is considered, we see no valid ground for holding that all the rights of the insured under the policy had ceased and determined on account of default in the payment of the interest on the outstanding notes. Whether a different result would have followed had there not been a dividend due the insured sufficient to meet the amount of interest, is not a question before us. The cases of the St. Louis Mutual Life Ins. Co. v. Grigsby, 10 Bush, 310, holds that even under such circumstances there will be no forfeiture of the policy; but it is not necessary to go to this extent in the case before us. The Kentucky case is criticised and disapproved in a recent decision made by the Supreme Court of Missouri in the case of Russum v. St. Louis Mutual Life Ins. Co. (3 Cent. Law Jour. 275). The counsel for the defendant favored us with a copy of the opinion of the court in the latter case as published in the St. Louis Republican, February 16, 1876. The court of Missouri think that the decision in the Grisby case virtually makes a stipulation in respect to the payment of interest on the outstanding notes which the parties to the contract declared to be of vital importance, of no significance whatever. Whether this criticism upon the decision in the Grisby case is well founded, is a point we shall not consider. It is quite sufficient to our purpose to say that the court of Missouri clearly recognized the principles which we have applied to the case at bar, and would doubtless have enforced it in the Russum case had the facts of that case rendered it applicable. On the 2d of December, 1870, the time of making the third annual payment, the insured made default. A dividend was declared on the policy for that year of $129.89. In 1871 no dividend was earned, and in July, 1872, the insured died. The court say: "When on the 2d of December, 1870, he failed to pay the interest on his note for $580.11, then maturing, there was to his credit in the hands of the company $129.89. This sum the company was bound to apply first in such manner as to save the forfeiture; that is, to the payment in advance of the interest on this note. The balance was applicable to the reduction of the principal of the note. This left more than $480 of the principal of the note unpaid. When on the 2d of December, 1871, he failed to pay in advance the interest on this unpaid note, he incurred the forfeiture provided in the policy." It is very evident from this extract, as well as the reasoning in the opinion, that if a dividend had been earned for the year 1871, sufficient to discharge the interest on the outstanding note, that the policy would have been held good as to two tenths of the original sum insured. For then in that case, as in this, there would have been no ground whatever for holding that the insured had failed in the performance of the contract on his part, and that the company was thereby released from all obligations under it. The money would have been in the possession of the company to pay the interest when due and payable, for the dividends earned belonged to the insured. There is also a recent case in Iowa, (Ohde, adm'r, etc. v. Northwestern Mutual Life

Ins. Co.) 2 CENT. LAW JOUR. 567, which so far as it had a bearing on the questions discussed above support our views. But in affirming this judgment, it is not necessary to come in conflict in any way with the doctrine of the cases which hold that where the parties have agreed that upon failure to pay any note or obligation given for a premium the policy shall become void, that then a default works a forfeiture. Here there was no default, it being the duty of the company to apply the dividends earned, first to pay the interest on the notes, and then to the parties.

The judgment of the circuit court is therefore affirmed.

Misrepresentation.

MERCHANTS' NATIONAL BANK OF ST. LOUIS v. SELLS.

Saint Louis Court of Appeals, November, 1876.

Hon. THOMAS T. GANTT, Chief Justice.
" EDWARD A. LEWIS, } Judges.
" ROBERT A. BAKEWELL, }

1. Case in Judgment.—A stranger presenting himself at the plaintiff bank, on requesting the payment of a draft to one J. H. B , who he represented himself to be, was told by the teller that he must first be identified. Shortly after, he returned with the defendant's clerk, who had been sent by the defendant to identify the stranger, and stated this to the teller, adding, "This is J. H. B., it is all right; he (the defendant) knows him." Relying upon this, the teller paid the money to the stranger, who turned out to be an impostor. Defendant was honestly mistaken and acted in good faith. *Held*, that he was not liable as a guarantor, or subject to an action for deceit.

2. Rule at Law.—If a person states what he knows to be untrue, or makes an assertion as to the truth or falsity of what he knows nothing whatever, and so induces another to act to his own prejudice, a fraud in law is committed. But though the representation made be false, yet if the defendant had reason to believe it true, he incurs no liability, for he has been guilty of no deceit, and the gist of the action is fraud.

Error to the St. Louis Circuit Court.

The opinion of the court was delivered by Bakewell, J.

This cause comes to this court on writ of error, sued out by the Merchants' National Bank, seeking a reversal of the judgment rendered in favor of defendant, Sells, upon an agreed case, under the statute for the submission of controversies without action. The agreed case is as follows:

"The plaintiff, being then and now still, a corporation duly incorporated under the National Bank Act of the United States, on the 19th day of May, A. D. 1874, at its banking house in the City of St. Louis, received of the Fourth National Bank of Nashville, Tenn., a genuine despatch, of which the following is a true copy:

"R. Eagle, Cash. Mchts. Nat. Bk., St. Louis:

"Pay J. H. Britton, Southern Hotel, Five Hundred Dollars, and ch'ge our acc. JNO. PORTERFIELD, Cash.

"After the receipt by plaintiff of this despatch, and on the 19th day of May, A. D. 1874, a person claiming to be the J. H. Britton named in said despatch, called at said banking house, and requested of the teller payment of the five hundred dollars, at the same time exhibiting a telegram purporting to have been sent to J. H. Britton, by said Fourth National Bank of Nashville, Tenn., and stating in substance that plaintiff would pay him $500. In reply to this request, the teller informed the person so claiming to be J. H. Britton, that he could get the money as soon as he was properly identified, and asked him whether he was or was not acquainted with some one in the city of St. Louis, to which the person answered, yes; that he thought Sells & Co. might identify him, whereupon he was told by the teller that identification by the house of Sells & Co. would be satisfactory. The person then left the bank, and went to defendant's store, and found defendant, Luke Sells, in his office. Defendant was then, and now still is, engaged in the produce and commission business, in the city of St. Louis, under the name of Sells & Co. Upon meeting defendant, said person introduced himself, and defendant recognized him as a person whom he had met at Winterville, Miss., as an employee of the house of Moore & Winters, in the spring of 1873 but being unable to recollect his name, the person showed him the telegram above referred to, and requested defendant to identify him at the plaintiff's banking house. Defendant had no interest whatever in said person, nor was he in any manner concerned in the $500.00 in question, but believing said person to be the J. H. Britton, defendant requested his book-keeper, Goodin, to go with said pesson to the plaintiff's banking house to identify said person. Thereupon, said person and said Goodin went to plaintiff's banking house, and said Goodin stated to plaintiff's teller that he had been sent by Mr. Sells, the defendant, to state: 'this is Mr. J. H. Britton, it is all right, he knows him.' Relying upon this identification, the plaintiff paid said person so identified the $500, receiving from said person a draft of which the following is a true copy, with the endorsements thereon:

"$500. ST. LOUIS, 19 May, 1874.

At sight, pay to the order of Mchts. Nat. Bank, Five Hundred Dollars, value received. JAS. H. BRITTON."

To Fourth Nat. Bank, Nashville, Tenn.

Endorsed, Pay Jno. Porterfield, Cash. or order.

"Which draft was executed by said person immediately after said identification, in the presence of said teller. J. H. Britton was a stranger to, and not a customer of, the plaintiff. Upon the presentation of this draft, it was dishonored, and it turned out that the said person was not J. H. Britton, and not entitled to said money, but that he was another and different person, bearing no such name. He having disappeared, the $500 was lost to plaintiff, and plaintiff on 29th May, 1874, notified defendant of this loss, and demanded payment of the $500 from him, which defendant refused. Plaintiff upon these facts, claims judgment against defendant for said $500, and interest thereon at six per cent. per annum, from the said 29th day of May, 1874. Defendant claims that having acted in good faith, executed no guaranty, and received no compensation or reward in the premises, he is not liable upon the case so stated." The St. Louis Circuit Court on May 17, 1875, heard and took this controversy under advisement until the following June 25, 1875, and then declared the law to be: "That upon the facts as set forth in the agreement of the parties constituting this case, the defendant is not legally liable to plaintiff, and defendant is entitled to a judgment in his favor," and judgment was rendered, accordingly, for the defendant. Plaintiff having saved all exceptions, the cause is brought here by them on appeal.

It is clear that the defendant here made no express promise that he would make good the representations of this pretended J. H. Britton that he was the person named in the dispatch to the bank. He is not liable as guarantor, in the sense that he undertook to make good any agreement of the pretended Britton; such a contract is within the Statute of Frauds. He is not liable on a verbal contract as an original promissor, for it can not be said that in consideration that the bank would advance $500 to this imposter, he expressly agreed to refund the money to the bank if he should turn out not to be J. H. Britton. If there were any such understanding between Sells and the bank at the time, it can not be doubted that Sells would have been required to endorse the draft which the bank required the imposter to make at the time he received the money.

It is said that there is an estoppel *in pais*. What is it that Mr. Sells is estopped to deny? It is the bank that avers that this imposter was not J. H. Britton. Mr. Sells said he was Britton. It is clear that Mr. Sells would be glad to maintain the entire truth of this statement; unhappily this can not be done. If the bank has any ground of action against Sells arising out of the transaction detailed in the agreed statement, it can only be an action for deceit by false and fraudulent representation. In such an action a *scienter* must be alleged. The petition would not state facts sufficient to constitute a cause of action, unless it said that the defendant made certain representations knowing them to be false. On the trial, it would be sufficient to show in that respect, either that the defendant knew that this imposter was not Britton, or else that the defendant knew nothing whatever on the subject. Either state of facts would sustain the allegation, because it would be as much a falsehood and a fraud to induce another to pay out money on a statement that a man known to the speaker to be John Smith is John Brown, as to say that a man is named John Brown whom the speaker never saw before, and as to whose name he has no knowledge or information whatever. It is quite clear that if a total stranger should meet a merchant and say, "My name is John Brown, I wish to be identified in bank," the falsehood would be as complete if the merchant should say to the teller, "I know this man to be John Brown," as if the merchant actually knew him to be John Smith. But, if upon the trial, it should appear that the defendant had himself been imposed upon; that he had acted in good faith, and had some reason, though an insufficient one, to believe the stranger to be John Brown, the *scienter* would not be proved, and plaintiff could not recover. The mere fact that the stranger said he was John Brown, in the case supposed, would not, of course, be a sufficient reason to warrant an introduction to the teller of a bank, because if the stranger's word is to be taken in the matter, it might as well be given directly to the teller, as to the merchant who is asked to introduce him. But, if from any circumstance, the merchant who introduces the stranger, acting in good faith, believes in truth that the person whom he introduces bears the name by which he is introduced, there is no deceit, and no legal or moral fraud in the case. There may be want of caution, and there is also some want of caution on the part of the bank officer who pays the money to a stranger, on the introduction of a third party, without enquiring as to the means of knowledge on the part of the person by whom the stranger is introduced.

It is undoubtedly the doctrine of courts of equity that a misrepresentation may constitute a fraud against the effects of which they will relieve. But the case must be one in which one party has intentionally misled another to his injury, and, then, if the misrepresentation be material, that is, if it has furnished a motive for the acts of the other party, if it be of a matter of which one party is presumed to rely on the statement of the other, and the one deceived must have been misled by the statement to his injury. When a case arises presenting these three features, equity will relieve; and so far as relief is concerned, it is wholly immaterial whether the party misrepresenting the fact knew it to be false, or made the assertion not knowing at the time whether it were false or true. And if a person states what he knows to be untrue, or makes an assertion as to the truth or falsity of which he knows nothing whatever, and so induces another to act to his own prejudice, a fraud in law is committed. But though the representation made be false, yet if the defendant had reason to believe it true, he has incurred no liability, for he has been guilty of no deceit. And the gist of the action is fraud. A false representation made by the seller, unless fraudulently made, unless it be a guaranty will not avoid a sale; it would be a hard rule to say that it makes one absolutely liable, though made in good faith by a person who has no interest of his own to serve in making it. Representation differs from warranty in this: one is a contract; the other must be honestly made, and believed to be true at the time it

is made. When this is the case, even the vendor of goods is not liable for a false statement made to the vendee.

The principle involved in this case has been much discussed for a hundred years, both in England and America. It has been thoroughly canvassed by the ablest and purest judges, who have during that period adorned their profession, and been an honor to human nature; and, though there was some slight discussion at first, the question must now, we think, be taken to be settled, and settled altogether, in the sense indicated by what we have already said. The case of Pasley v. Freeman, 3 T. R. 51, was decided in 1789, and it was determined there that where a party makes a false representation of a matter enquired of him, in consequence of which the other is damnified, he shall answer in damages, where there has been a design to do injury by the falsehood. For the case goes no further than that. The case of Eyre v. Dunsford, 1 East, 318 (1801) followed upon the same ground, and it is expressly decided there that fraud is the gist of the action. Then came the case of Haycraft v. Creasy, 2 East, 92. It was tried before Lord Kenyon, and a verdict was rendered for the plaintiff, but on a rule being obtained to show cause why a new trial should not be had, upon argument before all the judges, the verdict was set aside, Lord Kenyon apparently dissenting, but expressing doubts, and a desire that the case could be put in such a shape as to be carried to the *dernier resort*. The facts were these: a Miss Robertson gave herself out as having suddenly inherited a great fortune; she was an adroit swindler, and for a time obtained great credit, and lived in magnificent style. Defendant had himself been duped by her, and had lent her £2,000. While Miss Robinson was fitting up her house near London, (she had formerly been a school-teacher in another town) application was made in her behalf, by defendant to plaintiff's son, who carried on the iron-monger business in his father's office, defendant stating that he had recommended Miss Robertson to come to plaintiff for such articles as she might want in the way of his business. The plaintiff's son enquired as to her responsibility, she being an entire stranger to him and his father, to which defendant answered, "your father may credit her with perfect safety, for I know *of my own knowledge*, she has been left a considerable fortune lately by her mother, and that she is in daily expectations of a much greater, at the death of her grandfather, who has been bedridden a considerable time." The defendant afterwards came with Miss Robertson and her companion, (also known to defendant for many years as keeper of the same school) and they ordered articles to a large amount. Plaintiff's son swore he dealt with them entirely on defendant's information. The order being large, he again asked defendant if he were certain as to the representation he had made, who again answered with the same certainty, and never expressed any doubts. The son thereupon wrote to plaintiff, and in consequence of the answer he received, applied to his uncle to see defendant on the business. Defendant repeated to the uncle his assertion that Miss Robertson was a person of great fortune, and greater expectations, and was related to certain persons of rank whom he named; and added: "I can positively assure you of my own knowledge that you may credit Miss Robertson to any amount with perfect safety." Various other assertions to the like effect were proved, but particularly on one occasion; after representations of this sort had been made to the plaintiff's brother, the latter said to defendant: "I hope you do not inform me upon bare hearsay! but do you know the fact yourself?" The defendant answered: "Friend Haycraft, I *know* that your brother may trust Miss Robertson with perfect safety to any amount." Lord Kenyon, on the motion for a new trial, said that he had been unable to distinguish this case from Pasley v. Freeman, in which he had sat, and though not then so well versed in the critical form of actions, had had the assistance of three very able judges, from one of whem, now his colleague, he had the misfortune to differ; that it is repugnant to all religious, moral and social duties to make false representations to induce another to take measures that injure him; that he considered Pasley v. Freeman had been followed, and was of binding authority and in point. "It is said," says Lord Kenyon, "that I imputed no fraud to this defendant on the trial. It is true I used no hard words, because the case did not call for them. It was enough to state that the case rested on this: that the defendant affirmed that to be true within his own knowledge which he did not know to be true. This is fraudulent, not, perhaps, in that sense which affixes the stain of moral turpitude on the mind of the party, but falling within the notion of moral fraud, such as is presumed in all cases within the statute of frauds." Gore, J., professed himself unable to comprehend on what ground Pasley v. Freeman was decided, but says he is bound by it, but that it is not in point. That case was founded upon fraud. Defendant in this case was a dupe, to all appearances. Evidence that a man is a dupe, is not evidence that he is an intentional deceiver. Lawrence, J., says that the verdict might have been supported if the case had gone to the jury on the ground of fraud. There might have been some evidence to support the verdict, but it went to them on the ground that if the representations made by defendant were false, he was answerable, though a dupe himself. In order to support the action, the representations must be made *malo animo*. Le Blanc, J., says that this case differs from Pasley v. Freeman and Eyre v. Dunsford, in that there is here no question of fraud, or, at least, that question was not clearly left to the jury; and he thinks there was no fraud here. What the defendant said was not true, but there was no intention to deceive. It was a case where defendant, giving credit to arts practiced on him, conceived that to be knowledge which was mere hearsay, and made a false statement without intention to deceive. Had defendant had anything to gain by it, as in Eyre v. Dunsford, a false statement might satisfy a jury of fraudulent intent.

Ormrod v. Huth, 14 M. & W. 651, was decided in 1847, and the question is again examined, the briefs of counsel being quite elaborate. It was an action for false representation, alleged to have been made by defendant, on the sale of certain cotton to plaintiff, that the cotton was of the same quality as the sample exhibited. On the trial, the jury were instructed that the defendants were entitled to a verdict if they acted in good faith and without fraudulent purpose. This was held to be right, and the court says: "If a representation be honestly made, and believed at the time to be true by the party making it, though not true in fact, this does not amount to fraud in law, and the representation does not furnish a ground of action." And this rule, says Tindal, C. J., seems to be supported clearly by all the decisions.

So it was very early decided in this country in Russel v. Cranch, Exr. 7 Cranch, 70 (1812), Chief Justice Marshall delivering the opinion of the court, that the misrepresentation of the credit of a mercantile house, made under a mistake of fact, without any interest or fraudulent intention, will not sustain an action, although the plaintiff may have suffered damage by reason of such misrepresentations. And in Lord v. Goddard, 13 How. 198, it is decided that where an action is brought for giving a letter of recommendation, whereby another gave credit and sustained loss, though the representations be entirely untrue, there can be no recovery where there was no intention to deceive, and the court says that this is the well settled doctrine in America since Young v. Covell, 8 Johns. 23, decided in 1811. "The gist of the action," says Mr. Justice Catron, "is fraud in the defendants, and damage to the plaintiffs. Fraud means intention to deceive."

We are referred by counsel for appellants to Espy v. First Nat. Bk. of Cincinnati. 18 Wall, 604, but we find nothing in that case that overrules what we regard as the received doctrine on this subject. It expressly decides that a bank will not be liable for a "raised check" because the paying teller of the drawee of the check, in answer to a question, may have said that the check was all right, although the check was raised or altered at the time it was submitted to the teller, and although it was taken on the strength of the teller's statement. We are also referred to a recent case in Massachusetts, Litchfield v. Hutchinson, 117 Mass. 195. But that was a case of material representation in the sale of a horse made by the seller, in regard to a matter within his knowledge, and relied upon by the purchaser. It was clear fraud, and the defendant was benefitted by his own gainful lie. The case is not like the one before us.

The defendant here was deceived himself, and under circumstances which furnished some palliation for what was certainly an act of imprudence in an experienced business man. He had seen the imposter before and under favorable circumstances, and had known him as respectably connected in business in another town. He had no suspicion in regard to him. When the swindler presented himself, defendant remembered his face and the circumstanes under which he had known him before, but he did not recall his name. But the imposter held in his hand a telegram addressed to him as J. H. Britton, and defendant in good faith thought that was his name, and told plaintiff that he was J. H. Britton. We are asked to say that he is liable to plaintiff for the loss that accrued to them in consequence of this mis-statement. As a matter of law we do not think he is, it being admitted that he had no personal interest in the matter, that he acted in good faith, and that he was himself deceived. The judgment of the circuit court is affirmed. All the judges concur.

Maritime Law.

THE OCEAN SPRAY.

United States District Court, District of Oregon, November, 1876.

Before Hon. M. P. DEADY, District Judge.

1. Revised Statutes, Sections 1956 and 4337.—A vessel is not engaged in the violation of section 1956 of the Revised Statutes, which provides that "no person shall kill any . . . fur, seal . . . within the limits of Alaska territory," etc., unless such vessel is used or employed in the actual killing of such seal; and a mere preparation or intention upon the part of her master or owners so to employ her, is not sufficient to constitute the offence, if for any reason no seals are killed. A vessel enrolled and licensed for the fisheries does not violate section 4337 of the Revised Statutes, which prohibits such vessel from proceeding on a foreign voyage without being registered, by touching at, or entering the foreign port of, Victoria, for supplies or any purpose other than trade, on her way from San Francisco to the fishing grounds on the northwest coast.

2. Who are Mariners.—All persons who are employed on a vessel to assist in the main purpose of the voyage are mariners, and, therefore, persons who shipped on The Ocean Spray at Victoria as sealers, to take seal in the northern waters—that being the object of the voyage—are mariners, and have a lien upon the vessel for their wages.

3. Voyage Stopped—Rights of Seamen.—When a voyage is broken up or lost by the act or fault of the master or owner, the seamen are nevertheless entitled to their wages for the full voyage, or the time which it would probably require to complete it.

4 The Maxim "Freight is the Mother of Wages."—The rule "freight is the mother of wages," does not apply to a fishing or sealing voyage, and appears to be abolished altogether by section 4525 of the Revised Statutes.

Rufus Mallory for the United States; *John W. Whalley* and *M. W. Fechheimer* for Wilkins *et al.*; *David Goodsell* for Gallagher *et al.*

DEADY, J.—On March 27, 1876, the Schooner Ocean Spray, of 83 tons burden, being duly enrolled and licensed at San Francisco, for "the fishing trade," sailed from that port, as appears by her shipping articles, for "Behring Sea or elsewhere, as the master may direct, on a fishing voyage"—Frank Howell, charterer, and Thomas Butler, master.

The crew consisted of the first and second mate, four men before the mast and a cook. She kept no log and had no manifest. Her cargo consisted of 45 tons of salt, 14 barrels of beef, 2 of pork, 12 of flour, 42 butcher knives, 6 guns, 48 water casks, 2 fishing lines and 12 hooks, and ship's stores, including 11 cases of whiskey. On the twenty-fifth day out, the vessel put into the port of Victoria, V. I., from which place, according to the consular certificate, she cleared on April 26, for "Wrangel, Alaska, on fishing license from San Francisco, Cal." At Victoria some trifling repairs were made to the vessel, and a crew of 24 Indians and 2 interpreters were hired to take seal in "the northern waters." A whale boat was also purchased here, and the vessel provided with some additional stores and goods for the slop chest—besides seal clubs for killing seals. On April 27th, the schooner proceeded to Neah Bay, W. T., where the master procured three canoes and two spear heads and staff. From there he sailed northward and made the Aleutian islands, probably at Ounimak Pass, about June 1. Here he came to anchor for a few days and supplied the vessel with wood and water, and then proceeding in the direction of the Pribylov islands, Alaska T., came to anchor about ten miles southeast of that group, called Sea Otter Isle. Here a canoe was sent ashore with six Indians and the interpreter Wilkins, under the charge of a Dr. Thatcher, who appears to have had some interest in the adventure, to reconnoiter the ground and ascertain whether there were any persons or seals upon it. On returning, the canoe was lost in the fog and, after being out four or five days, made the island of St. Paul's, distant about five miles from Sea Otter. The schooner remained off Sea Otter three days, going as near to it as two miles, and sending off two canoes to find the missing party. Then it sailed to St. Paul's, where the crew of the lost canoe were taken on board. Here it is probable that some disagreement arose between the master, Thatcher and Howell, which resulted in abandoning the voyage and starting homeward. At least, on June 30th the schooner had reached Makouchinskoy bay, on the southwest side of Ounalashka and about 250 miles southeast of Sea Otter, on her return voyage. There the vessel was boarded by Woods, the deputy collector of the district, and taken to the town of Ounalashka, and there formally seized and taken to Sitka, and thence to this district for trial.

The libel of information was filed on August 25th, and alleges two grounds of forfeiture: (1) That the schooner being duly enrolled and licensed "to carry on the fishing trade for one year," did proceed on a foreign voyage to the port of Victoria, contrary to § 4,337 of the R. S., which provides: "If any vessel, enrolled or licensed, shall proceed on a foreign voyage, without first giving up her enrollment and license to the collector of the district comprehending the port from which she is about to proceed on such voyage, and being duly registered by such collector, every such vessel, together with her tackle, apparel and furniture, and the merchandise imported thereon, shall be liable to seizure and forfeiture;" and (2) that in June, 1876, the schooner, "her tackle, apparel and furniture, Thomas Butler, master, was found engaged in killing fur seals within the limits of Alaska Territory, contrary to § 1956 of the R. S., which, among other things, provides: "No person shall kill any . . fur seal . . within the limits of Alaska Territory, or in the waters thereof; . . . and all vessels, their tackle, apparel, furniture and cargo *found engaged in the violation of this section* shall be forfeited."

The answer of the claimant, George Kenfield, to the libel of intervention by the Indians for their wages, admits that the latter were taken on board by the master at Victoria to go "to the islands of the northern ocean, for the purpose of catching seals;" and avers that during all of said voyage the schooner was under charter to Frank Howell and Jacob Nibble, of San Francisco, Cal., for a voyage of six months in the waters along the northern coast of the United States," in which the claimant had no interest, and during which he had no control of the vessel.

This being so, the charterers were the owners *pro tempore*, and the vessel is responsible for their conduct or that of their master—Butler—in navigating or employing her. But upon the evidence there can be no doubt but that the schooner left San Francisco for the purpose of engaging in killing fur seals on and about Sea Otter Isle. The fishing voyage and license therefor, was a mere cover for this unlawful purpose. No fish were taken or attempted to be taken during the voyage, except casually, for consumption on board—nor was there any fishing tackle provided, at all adequate to the purpose of taking a cargo of fish. The master went into Victoria for the purpose of procuring Indians to take and skin seal and preserve their skins; and the 45 tons of salt was doubtless provided for that purpose. But upon the evidence it cannot be said with any certainty that any seals were actually killed by any one on the schooner. No skins were found on board, and altogether it is not probable that any were taken. After they came upon the seal ground the enterprise seems to have been abandoned for some reason. In the language of one of the witnesses, the master's courage seems to have failed him at the last moment. It is quite likely that he feared he would be discovered by the people of the Alaska Fur Company, who might have become aware of the presence of the schooner in that vicinity by reason of the lost canoe coming ashore with its crew at St. Paul's.

However that may be, to be "found engaged in the violation of this section," a vessel must be engaged in *killing* seal—must be employed in the very act which is prohibited and made punishable by it, namely, *killing seal*. A *person* can not be punished under this section for preparing, intending or attempting to kill seal. He must actually kill one contrary to the prohibition. "No person shall kill any . . fur seal . . within the limits of Alaska Territory," etc. Until the deed is done, the *locus pœnitentiæ* is open to him, and he may abandon the illegal purpose, and avoid the punishment prescribed by the act. So with the vessel. It can only be engaged in violating this section when it is successfully used or employed to accomplish the same result. Upon this charge the libel is not supported by the proof.

As to the other charge, the evidence is satisfactory that when the master of the schooner left San Francisco, he intended to go into Victoria for the purpose of procuring a crew of Indians, who were expert in the management of canoes at sea, and understood the business of taking seal; and probably to procure any repairs or stores which he might need when there. But, according to the authorities, this alone was not a proceeding "on a foreign voyage" contrary to the statute. According to the established construction of § 8 of the act of February 18, 1793, now § 4337 of the R. S., a vessel licensed for the fishing trade may lawfully touch at a foreign port in the course of her voyage, provided she does not trade there. Says Mr. Justice Story, in the case of The Schooner Three Brothers, 1 Gal. 142, "But in my judgment, the foreign voyage intended by the act is where the vessel departs from the United States for a foreign port, *with an intent there to engage in trade*, and without an intent to seek employment in the fisheries. In Taber *et al.* v. The United States, 1 Story, 5, Mr. Justice Story also held that a whaling voyage was not "a foreign voyage" within the meaning of the act of 1803, ch. 62, concerning the clearance of vessels bound on a foreign voyage. In this case, the facts were, the Isabella sailed from New Bedford in 1834 on a whaling voyage and did not return until 1838. During her absence she touched at foreign ports for supplies, but was employed exclusively in the whale fishery. The object of the law is manifest. It is to prevent vessels engaged in the coasting trade and fisheries from becoming the medium of the introduction of smuggled goods, under the security and cover of their license. The Schooner Friendship and Cargo, 1 Gal. 49. But if a vessel engaged in the fisheries only touches at a foreign port in the course of her voyage, for supplies or repairs or for any other purpose than trade, she is not deemed to be engaged in a foreign voyage. The fisheries on our northwest coast are not so well known or long established as those in the northeast, but they are every year growing in importance, and many vessels are engaged in gathering cheap and wholsome food from this never failing harvest of the sea. The port of Victoria lies immediately on the route to the fishing grounds, and it is natural and convenient that vessels bound to and from them should touch there for many purposes other than foreign trade, and in so doing, according to the established construction of the act and the reason of the matter, they do not violate this section.

The information is therefore dismissed; but the vessel having proceeded to the waters of Alaska under a license to engage in the fisheries, but in fact for the purpose of taking fur seal there, contrary to law, and being found there and seized under very suspicious circumstances, a certificate of probable cause will be allowed.

Charles F. Wilkins, Casper W. Lindsey and 24 others have filed a libel of intervention to enforce a claim for wages as sealers on the voyage from Victoria to Sea Otter Isle, and thence to this port. The 24 others are the British Columbian Indians who were shipped at Victoria to take seal in the northern waters, and Wilkins and Linsey were employed and shipped at the same time as interpreters—the former at $55 per month, and the latter, together with the Indians, at $30 per month. This claim is resisted on the ground that the libellants were not shipped and did not serve as mariners, and their employment as sealers did not give them a lien upon the vessel for their wages. Neither the charterer nor the master appear in the case as claimants or witnesses. Their absence is not explained; and it is to be presumed that their testimony would not be unfavorable to the claims of these libellants.

The facts of the case appear to be that the Indians were shipped with the consent of Dr. Wood, the Indian agent at Victoria, and upon an agreement made with him for them. By this they agreed to ship to the northern waters to take seal, and to lend a hand on board whenever they were wanted, for the sum of $30 per month until they returned to Victoria, when they were to be paid off and discharged. They went on board on April 27, 1876 and remained with the vessel until they were put ashore at this port by the marshal on August 31. During that time and especially upon the outward voyage, when head winds prevailed, they helped make and reef sail, heave the anchor and clear decks, but did not stand watch. They also were employed in procuring drift wood and water for the use of the vessel. They messed by themselves in the hold of the vessel, and food was furnished them that was cooked for them by one of their number. They were under the control of the officers of the schooner, but communication with them was generally had through the medium of the interpreters. The smaller portion of them could understand and speak English enough for ordinary conversation.

No case has been cited upon the point of whether a sealer is to be considered a mariner, and therefore entitled to a lien upon the vessel for his wages. It is admitted that such persons as surgeons, carpenters, cooks, stewards and cabin-boys are considered mariners. But it is claimed that this is so for the reason that these persons all aid in the navigation and preservation of the vessel. But I think the better reason is found in the fact that they are co-laborers in the leading purpose of the voyage. Upon this ground, even if it be admitted that the libellants shipped and served as sealers only, they ought to be deemed mariners. They were certainly co-laborers and the principal laborers in the only purpose of this voyage—the taking of fur seal. The seamen who have an undoubted lien upon the vessel for their wages, only contributed to this purpose by navigating it. Without these sealers the voyage must have been profitless because the purpose of it could not have been accomplished. That nothing was accomplished is not their fault, and therefore it should not operate to their prejndice.

A principle of law—as that the persons on a vessel who are employed

in promoting the purpose of the voyage or aiding in her navigation, shall have a lien upon her for their wages—must be applied to new cases within the reasons of the rule as they arise. Now, it would be impossible to give any sound reason why the cook or even the sailors on the vessel should have a lien upon her for their wages, and the sealers, upon whom, mainly depended the success of the voyage, should not. The correct doctrine upon this subject is well set forth by Benedict in his Ad., § 241: "It is universally conceded that the general principles of law must be applied to new kinds of property, as they spring into existence in the progress of society according to the nature and incidents, and the common sense of the community. In the early periods of maritime commerce, when the oar was the great agent of propulsion, vessels were entirely unlike those of modern times, and each nation and period has had its peculiar agents of commerce and navigation adapted to its own wants and its own waters, and the names and descriptions of ships and vessels are without number. Under the class of mariners in the armed ship are embraced the officers and privates of a little army. In the whale ship, the *sealing* vessel—the codfishing and herring fishing vessel—the lumber vessel—the freighting vessel—the passenger vessel—*there are other functions besides those of mere navigation, and they are performed by men who know nothing of seamanship*—and in the great invention of modern times, the steamboat, and entirely new set of operatives, are employed, yet at all times and in all countries, all the persons who have been necessarily or properly employed in a vessel as *co-laborers to the great purpose of the voyage*, have, by the law, been clothed with the legal rights of mariners—no matter what might be their sex, character station or profession." And there is a special reason why this should be so in this case; for the master in employing these libellants explicitly pledged the vessel as security for the payment of their wages for the round trip, whether any seal were taken or not,

When it comes to be understood that fishers and sealers employed on the northwest coast, are to be considered mariners, it is probable that there will be some special rule established by which the amount of their compensation will depend somewhat upon the result of their labors. In this case, at first blush, it seems a hardship that the vessel should be bound to the libellants for full wages for the round voyage, when nothing was made or earned by it, and they had comparatively little or nothing to do. But that is not their fault. They kept their agreement. That the voyage actually contemplated by the master was illegal they had no reason to know. The "northern waters" to which they agreed to go, includes waters outside the limits of Alaska. What effect, if any, the seizure of the vessel is to have upon the contract, is a question that was suggested in the argument, but only touched upon by counsel. The capture and condemnation of a neutral vessel dissolves the seaman's contract for wages, and he can recover nothing for the voyage; but a mere capture, without a condemnation, does not; and, in the meantime, the contract is only suspended, and the seamen have a right to remain with the ship and abide the result. The Saratoga, 2 Gal. 164; Pitman v. Hooper, 3 Sum. 300. But in this case the purpose of the voyage appears to have been abandoned, and the vessel turned homeward before the seizure, and she has since been acquitted. And this was the act of the master, and can not affect the rights of the libellants. But if we should regard the seizure as the cause of the failure of the voyage, the rule established by the authorities seems to be, that when the voyage be broken up, interrupted or lost by the act of the master or owner, the seamen are entitled to their wages for the full voyage, or damages upon the contract in the nature of wages. Hoyt v. Wildfire, 3 John. 520; The Maria, 1 Bl. & H. 334; The Uncle Sam, 1 McA. 77; The Littlejohn, Pet. Ad. Dec. 115.

Neither do I suppose that the rule "freight is the mother of wages," can be applied to a voyage like this. But if it could, the fact that the failure or abandonment of the enterprise, appears to be attributable to the master and owner *pro tempore*, would prevent its being applied so as to bar a recovery by the libellants in this case. Besides, the rule itself seems to be abolished by section 4525 of the Revised Statutes, which provides: "No right to wages shall be dependent on the earning of freight by the vessel."

It follows that the libellants are entitled to a decree for the wages specified, for the term of four months and seven days. William Gallagher, the first mate, and six others, being the second mate, four sailors and the cook, have also filed a libel of intervention to enforce a claim for wages for the whole voyage, at the rate of $75 a month for the first mate, $50 a month for the second mate and cook, and $35 a month for the sailors, less certain advances stated in the account annexed to the libel. No defence is made to this claim, and it is allowed from the sailing of the vessel from San Francisco until August 31.

The matter is referred to the clerk to ascertain and report the sum due each libellant, according to the conclusions of this opinion.

Selections.

THE UNDERSTANDING OF WITNESSES AS TO THE GIVING OF CREDIT.—The line so difficult to define between acts and facts, to which a witness may testify, and mental conclusions or "understanding, to which (apart from the rule as to the opinions) a witness can not testify, is well exemplified in the conflict as to whether a witness can be asked who was given credit in a transaction, or whether his testimany must be strictly confined to what was said. Some later decisions seem to disregard the rule formerly considered to be well established. In Merritt v. Briggs, of which a brief note is given in 57 N. Y. 651, defendant being sued for the price of cattle, gave evidence tending to show that he bought as a broker for a third person, and it was said to be error to allow him to be asked to "state on whose credit the cattle was bought," for such a question called for the witness's conclusion or opinion. So, in Nichols v. The Kingdom Iron Co, of which a memorandum is given in 56 N. Y. 618, the question was whether the sale was to defendant or to one Colt, and plaintiff having proved that he demanded payment of Colt, was asked whether he asked Colt for the payment of the bill "as his debtor." An objection that this called for a construction of what was said and not the language, was sustained. In Keller v. Richardson, of which a memorandum is found in 5 Hun, 352, on a similar controversy, the plaintiff being examined as a witness in her own behalf, was allowed to be asked, "To whom did you look for performance of the contract?" *Held*, that this was error, as the answer showed merely her thoughts and not her acts. So, in Filkins v. Baker, 6 Lans. 516, a question, "What was done by reason, etc.," was held to call for matter of opinion. In Raynor v. Page, 2 Hun, 652, on the other hand, a witness was allowed to testify as to how he held the deed, whether absolutely or as a mortgage. In Lewis v. Rogers, 34 N. Y. Sup. Ct. 75, the defendant was allowed to be asked whether the supplies furnished after the delivery of a certain note, were furnished on the credit of the note or not. In Sweet v. Tuttle, 14 N.Y. 465, where the question was whether the services, compensation for which was sued for, were rendered to the defendant alone or to others jointly with him, whom he insisted should have been co-defendants, his counsel were allowed to ask a witness, who was one of those named by defendant as jointly liable with him, to state "on the part and behalf, and for whom was the services rendered." Comstock, J., in an opinion in which the majority concurred, disposed of the objection by saying "the question did not call for an opinion, and, therefore, was not good objection on that ground. The fact which it called for may have been a conclusion deducible from other special facts, but this could not well appear until the question was answered, and the examination then pushed somewhat further. After the enquiry was answered, the plaintiff had a right, if he pleased, to cross-examine, and it might thus have appeared that the fact stated by the witness was a mere deduction of his own mind from the special circumstances of the transaction. But this course was not taken, and on the face of the question I think the answer called for, belonged to a class of facts to which a witness may be allowed to speak directly."

This subject has recently been carefully considered by the Supreme Court of the United States, and their views seem more in harmony with this conclusion than with the later decisions of the court of appeals, so far as we can judge from the meagre memoranda published. The case which settles this question for the courts of the United States is Bank v. Kennedy, 17 Wall. 19, and it goes somewhat beyond the last mentioned case in stating the ground of the admissibility of such questions. The controversy there involved the question whether a note signed by a bank cashier was given by him on his own account or on account of the bank of which he was cashier. The cashier was called as a witness, and stated the circumstances under which the note and certain drafts had been given, and among other things he stated that he delivered them to the president, who delivered them to one English, and that English handed them to the receiving teller. He was then allowed to be asked for what purpose the drafts were delivered to English, and the court held, Bradley, J., delivering the opinion, that he being one of the principals in the transaction was, under the circumstances, competent to testify as to the purpose for which the drafts were delivered. He was also allowed to be asked why the drafts were not endorsed. The Court says: "It must be competent for a party to the transaction, cognizant of all the circumstances and a witness of the act, to state its purpose, being subject, of course, to cross-examination. The manner in which an act is done being one of several acts concurring to one purpose or transaction, indicate to a mere observer, by shades of circumstances often difficult to analyze, what was the character of the act or the intent and purpose with which it was done." To a similar effect was the doctrine of the court of appeals of this state, in Richmondville Union Seminary v. McDonald, 34 N. Y. 379, where, in an action on a subscription paper, a witness was allowed to be asked, "Were the debts contracted by the trusees and officers of plaintiff on the faith of and relying upon subscription made?" The court held that the objection that this called for a conclusion of the witness and not a fact, was not tenable. "If it be assumed," said James C. Smith, in delivering the opinion, "that the witness had such an acquaintance with the acts of those who contracted debts as the agents of the plaintiff as to enable him to speak to the subject, overruling the objection was not erroneous. If the opposite party wanted the witness to state the matter more in detail, he could have cross-examined him for that purpose."—[*Daily Register* (*N. Y.*)

Recent Reports.

BISSELL'S REPORTS.—Cases Argued and Determined in the Circuit Court and District Courts of the United States, for the Seventh Judicial Circuit. By JOSIAH H. BISSELL, of the Chicago Bar, Official Reporter. Volume VI. 1874 to 1876. Chicago: Callaghan & Co. 1876.

The judges of these courts during the period embraced in these volumes, were Hon. David Davis, Associate Justice of the Supreme Court of the United States; Hon. Thomas Drummond, Circuit Judge for the Seventh Circuit; Hon. Samuel H. Treat, District Judge for the Southern District of Illinois; Hon. Walter Q. Gresham, District Judge for the District of Indiana; Hon. Henry W. Blodgett, District Judge for the Northern District of Illinois; Hon. James C. Hopkins, District Judge for the Western District of Wisconsin; Hon. James H. Howe, District Judge for the Eastern District of Wisconsin; and Hon. Charles

E. Dyer, District Judge for the Eastern District of Wisconsin. The bench of this circuit will compare favorably for ability with that of any other of the federal courts. A glance at the index will show that a greater variety of questions come before these courts than are usually determined in any of the state courts. Thus, the district courts have original jurisdiction of all questions of admiralty and maritime cognizance, and in the same cases the circuit courts have appellate jurisdiction. So both the district courts and the circuit courts have original jurisdiction over a great variety of criminal actions relating to the enforcement of the revenue laws, and to the administration of criminal justice within arsenals, dock yards or other lands ceded to the United States. The district court also sits constantly as a court of bankruptcy, and over most questions arising under the bankrupt law, the jurisdiction of the circuit court by petition for review, is final. The importance of these courts has been greatly enhanced by the fact that the last Congress increased the amount necessary to give jurisdiction to the supreme court to $5,000. This makes, perhaps, the great majority of causes tried in the Circuit Courts of the United States, necessarily final, and greatly increases, no doubt, the care of the judges in making up their decisions, and correspondingly enhances the value of their decisions as authorities. The circuit court is the federal court of general law and equity jurisdiction. It has cognizance of all suits in law and in equity where the citizenship of the parties gives jurisdiction, and where the amount in controversy exceeds the sum of $500. The federal courts have become courts of favorite resort to non-resident suitors within the last few years, owing in a large measure, perhaps, to the fact that the judges are appointed to their offices during good behavior. Each judge, therefore, has a life estate in his office and its emoluments, and is thereby removed beyond the temptation of corruption, and beyond partizan influences. To this there have been some unfortunate exceptions, particularly in the South, but these exceptions arose under the peculiar circumstances succeeding a great civil war, and ought not to detract from the very high character which the federal judiciary has always sustained.

The work of the reporter is in general well done, and he has enriched many cases with foot-notes, in which he has industriously collected other decisions bearing upon the questions involved. We may suggest, however, that his head-notes are perhaps susceptible of improvement. We can hardly understand upon what principle these head-notes are constructed. There seems to be an indiscriminate mixing together of points decided, and of argument. This, it seems to us, should be carefully avoided. The points decided should be carefully eliminated and stated, and then, if the court has asserted any novel or important principle by way of argument, it might be stated and distinguished as such. In running over the pages of this volume, we encounter a good many familiar cases, published at the time they were decided in the *Chicago Legal News* and in the CENTRAL LAW JOURNAL; but we also find a great many that we have not previously seen, to some of which we will call attention:

The first case, *The Harriet Ann*, p. 13, decides that a seaman's lien will not be enforced in admiralty, as against a *bona fide* purchaser after the lapse of two seasons, because it has then become stale; and that although courts of admiralty are not governed by any absolute rule of limitation, they will never do injustice to *bona fide* purchases, by the enforcement of old secret liens. See under the same head, The Propeller Dubuque, 2 Ch. Leg. News, 381; The Key City, 14 Wall, 653; The Scow Melissa, 6 Ch. Leg. News, 271. The reporter in a foot-note states that in The Hercules, 7 Ch. Leg. News, 419, Judge Brown decided, in the Eastern District of Michigan, that creditors of a vessel plying the lakes must enforce their liens as against *bona fide* purchases without notice, during the season of navigation, or within such reasonable time after the commencement of the new season as might be necessary to arrest the vessel; but that the circumstances of the case would frequently vary the rights of the respective parties.

Bullene v. Blain, p. 22, decides that a note given to an agent of a creditor, under the threat of interference to defeat a proposed compromise, is void in the hands of a payee. This the reporter denominates, a note "given under pressure." The court also holds in the same case, that to pay one creditor or his agent, a larger sum than was to be paid others, as a condition of accepting a compromise, is void, and if the creditor's agent was especially retained by the debtor to urge such a compromise, any promise to the agent for such services is void.

Main v. Second National Bank, p. 26, decides that a national bank can not be sued in the federal courts outside of the jurisdiction where it is located. Service on a cashier when found within another district, does not give jurisdiction: following Manufacturers' National Bank v. Baack, 8 Blatch. C. C. 137.

The disposition of the federal courts to assert strongly their own jurisdiction, is illustrated in the case of *Miller*, a bankrupt, p. 30. The reporter here, as in other cases, has got a good deal of the *spirit* of the decision in his head-note. He states that the case decides that when the bankrupt law can not be properly administered by the bankruptcy court, owing to the interference of a state court, and its determination to adjudicate upon rights of parties and property in the bankruptcy court, then the latter court *ought not to hesitate to assert its authority;* that in questions under the bankrupt act, federal and state courts are not independent, but the federal courts are superior; that the decisions by the bankrupt court, that the transfer was in fraud of the bankrupt act, is binding upon the state courts; and that the creditor must come into the bankrupt court to assert his rights as against such decision; that if, instead of doing this, he sue the marshal and the assignee in trespass, in a state court, the bankrupt court may enjoin the parties to the suit. The opinion was by Drummond, J. In the subsequent case of the *Union Trust Co. v. Rockford, Rock Island & St. Louis R. R. Co.*, p. 197, the court, Drummond and Blodgett, JJ., again go over the question, and reiterate the principles which must control, where suits relating to the same subject-matter are brought into courts of co-ordinate jurisdiction. In the subsequent case of *Whipple*, a bankrupt, p. 516, it is laid down by Blodgett, J., that proceedings in bankruptcy supersede a creditor's bill in a state court; that the receiver appointed by the state court can be compelled to deliver the property over to the assignee in bankruptcy, subject to the rights which the creditor whom he specifically represents has obtained, and to all the priorities which they have obtained by their diligence.

The next case, that of the *National Life Insurance Co.*, a bankrupt, p. 35, decides that the amendment to the bankrupt act of February 3d, 1876, does not deprive the bankruptcy courts of jurisdiction over a corporation of which a receiver has been appointed by a state court; that the amendment does not oust the federal courts of jurisdiction, but simply saves the acts done by the state court and receiver prior to the filing of the petition.

On page 53 we find the already celebrated case of *ex parte Young*, which holds that "put" contracts are against public policy, and void. The report of the case is enriched by a copious setting out of the authorities relied on by the opposing counsel in their briefs.

A very important principle is announced in *Pereles v. The city of Watertown*, page 79, by Hopkins, J. A statute of Wisconsin reads as follows: "No action brought to recover any sum of money on any bond, coupon, interest warrant against, or promise in writing, made or issued by any town, county, city or village, or upon any installment of the principal or interest thereof, shall be maintained in any court, unless such action shall be commenced within six years from the time such sum of money has or shall become due, when the same has been or shall be made payable to the bearer, or to some person on his order; *provided that any such action may be brought within one year after this act shall take effect;* provided further, this act shall in no case be construed to extend the time within which an action may be brought under the law heretofore existing." The *proviso* we have printed in italics is held by the court to be unconstitutional and void, because it affects existing rights of action, and prescribes a limitation within which a suit may be brought, which is unreasonable. The decision lays down distinctly the rule that in such cases the legislature is not exclusively the judge of the reasonableness of the time limited. In his opinion the learned judge says: "The cases of *Stearns v. Gittings*, 23 Illinois, 387, and *Price v. Hopkin*, 13 Michigan, 317, do not present the question involved here. But the case of *Berry v. Ransdall*, 4 Metcalf (Ky.) 292, lays down a contrary rule, and holds that a limitation of thirty days upon existing causes, was unreasonable. The court did not regard the authority of the legislature to fix the time as absolute, but as subject to the control and judgment of the court. I think this the better rule. When the statute relates to causes of action occurring after the passage, it may be conceded that the power of the legislature is absolute, in fixing the time within which an action shall be prosecuted. In such cases, the parties are supposed to have contracted in reference to it, and the question of its impairing the obligations of the contract would not arise. But a very different rule applies to statutes of limitations intended to apply to existing causes of action. The legislature can not directly impair the obligation of such contract, nor can it deprive a party of his property without due process of law. The fixing of an unreasonable time to sue is deemed an impairment; therefore holding that the legislature were the sole judges of what was reasonable time, is inferentially conceding to them the power of impairing, and even destroying, the obligation of a contract. This seems to me to be the logical result of such a doctrine, and I can not adopt it. I think the time fixed by the legislature, within which actions must be brought upon existing contracts, is not conclusive, but is subject to be reviewed by courts, and if they deem it unreasonable, it is their duty to disregard such statute, as violative of the constitutional inhibition against passing laws impairing the obligations of contracts. A statute prescribing an unreasonably short time, is not a statute of limitation, but an unlawful destruction of a right, whatever it may purport to be by its terms. It was claimed that limitation laws were statutes of repose, and were now regarded with favor; they undoubtedly are; but they should allow citizens all needful remedies, and should, therefore, give a fair opportunity for all to apply to the courts for redress, after their passage. The supreme court of this state has as directly passed upon this question as any court whose decision I have been able to find. Dixon, Ch. J., says: 'So far, then, as the constitution of the United States reaches or affects the alterations of the remedy, such alterations are, first, matters of sound discretion with the legislature; and, secondly, with the courts. The legislature having power, within the limits above stated, to control at their pleasure the remedy, and to determine for themselves whether parties to contracts are left, in the first instance, with a substantial remedy, according to the laws as they existed before such change, subject to a revision in the last particular by the courts.' This fully sustains my opinion as to the authority of the courts in such cases." The reporter has added to the decision a number of authorities bearing upon this question.

Wheeler v. Bates, p. 88, decides that the United States Circuit Courts have, in certain cases, jurisdiction of actions of forcible entry and detainer.

In the *People v. Chicago & Alton R. R. Co.* p. 107, which was a suit brought under the Illinois railroad act of 1873, by the state, the railroad company endeavored to remove the cause to a federal court by a *certiorari*. It was held by Drummond, J., that the federal court has no jurisdiction in such cases.

In the *Atlantic & Pacific Telegraph Co. v. Chicago, Rock Island & Pacific Railroad Co.*, p. 158, it is held that a telegraph company can not, under

the act of Congress, of July 24, 1866, nor under the acts declaring railroads to be post roads, erect its line of telegraph over the right of way of the railroad company, without making compensation therefor according to law; and that it would be beyond the power of Congress to authorize the telegraph company to construct its line over private property without making compensation.

Chapman v. Republic Life Insurance Co., p. 238, holds that it is competent for an insurance company to restrict its liability by a clause avoiding liability, "in case of the death of the insured by his or her own act or intention, whether sane or insane," and that in such case no degree of insanity will avoid the condition. Opinion by Blodgett, J.

On p. 259, "Up came *Rindskopf*, broken and bent, and straightway to jail that man was sent"—at least this is the way the Chicago *Times* had it, at the time Rindskopf was indicted for conspiracy to defraud the government of its revenue. In Rindskopf's case, as reported in this volume, Blodgett. J., lays down the proposition of law which applies to conspiracies of this kind.

Re Salkey & Gerson is a case upon the question of bankruptcy, as to which, we believe, there are but two American bankrupt cases, and we are glad to notice that, in this case, Mr. District Judge Blodgett has been able to rest his decision upon three or four English cases. The case appears to have been one where the defendants became bankrupt, and did not surrender to the assignees all of their property, and failed to account for the amount which they did not surrender. It it ruled, that if, in such a case, the bankrupt refuses to give a satisfactory account of his property or his dealings previous to the bankruptcy, and fails to surrender all his property, he may be committed for contempt; that if property is traced to the bankrupt, it is no answer for him to say that he can not tell what became of it. He must satisfy the court that he has fully and honestly accounted for his property, according to the facts. The case also rules that where, just prior to proceedings in bankruptcy, the bankrupt's stock of goods was rapidly diminishing, and not in the ordinary course of business, it is a legitimate conclusion that it was fraudulently removed and sold, and the bankrupt will be presumed to have control over it. This case would seem to go very far, but perhaps no farther than the necessity of such cases will warrant. It is seldom possible, in cases of this kind, to show by positive testimony what the bankrupt has done with his property. A reasonable rule would seem to be this: Although the bankrupt may have fraudulently made way with his property, yet if, after he has made way with it, he clearly shows his inability to reproduce it, or to produce and surrender the avails of it, he can not be committed to jail and kept there indefinitely for contempt, because contempt in such a case consists in refusing to do what the contemnor has the power to do; and whenever the court says that it is no excuse for the bankrupt to show that he has no power to respond to the order of the court, then the court transforms itself from a court of bankruptcy to one of criminal jurisdiction, and, without the aid of an indictment or trial by jury, assumes to wield against the bankrupt the penal justice of the country. This it can not do, for the bankrupt act provides means for the indictment, trial by jury and the punishment of bankrupts who commit frauds of this character. This decision of Judge Blodgett was confirmed by Judge Drummond on *habeas corpus*, in the case reported on p. 280.

Gaylord v. The Fort Wayne, Muncie & Cincinnati Railroad Co. p. 286, decides that the court may not forfeit the franchise of a corporation on the application of individuals. The right belongs to the state alone.

Irons v. The Manufacturers' National Bank, p. 301, holds that the power conferred by the banking act upon the comptroller of the currency, to wind up the affairs of a national bank in certain contingencies, does not exclude the authority of a competent tribunal to appoint a receiver in other cases.

In the *United States v. Badger*, p. 308, certain town officers endeavored to avoid service on a *mandamus* obliging them to audit and pay certain judgments against the town, by resigning their offices; but it was held by Blodgett, J., that under the Illinois township organization law, their resignation did not relieve them from duty and liability, until their successors were qualified; and a peremptory *mandamus* was therefore awarded.

In the *Kate Hinchman*, p. 367, it is held by Blodgett, J., that where a vessel has been sold under a libel for wages, and the proceeds paid into the registry of the court, they will be distributed as follows: 1. The libel for wages and the costs thereof. 2. A regular and duly recorded mortgage. 3. The clerk's, marshal's and proctor's fees in the various petitions filed, limiting the proctor's fees where they have filed more petitions than necessary. 4. The balance *pro rata* amongst the material men and supply men, they being at the home port.

In the case of *Daniels*, a bankrupt, p. 405, Blodgett, J., holds that brokers carrying stocks on a margin, which at the time of commencement of bankruptcy proceedings, could have been sold out at a profit, but who carry until a decline, and finally close out at a loss, all without application to the court, can not prove their claim for difference against the estate; that the broker who holds stocks on a margin is bound to take notice of the buyer's bankruptcy; that if the broker who holds stocks on a margin, continues to hold them for an unreasonable length of time after the buyer's bankruptcy, and then sells them without notice, he must sustain the loss.

Warren v. Wisconsin Valley R. R. Co., p. 425, opinion by Blodgett, J., holds that the proceedings to condemn lands for a railroad company, may be removed from the state court to the United States Circuit Court.

In the case of *Hatje*, a bankrupt, p. 436, it is held that an attaching creditor, though not a party to bankruptcy proceedings, may contest the adjudication on the ground that the requisite number and amount of editors have not joined in the petition.

The conflict of jurisdiction which has recently arisen between the federal courts and the state courts of Wisconsin, over the question of the power of the state to require a foreign insurance company doing business in that state, to enter into an agreement not to remove any suit brought against it in the state courts to the federal courts, is illustrated by the case of the *Hartford Fire Insurance Co. v. Doyle*, p. 461, in which it is held by Hopkins, J., that the United States Circuit Court can grant an injunction restraining the secretary of state from attempting to forfeit the license of the insurance company, where the company violates the stipulation.

In the case of *Sutherland*, a bankrupt, p. 526, the novel point is ruled that a certificate of membership in a board of trade, is not an asset which will pass to an assignee in bankruptcy.

We may add that this book is printed and bound, in a manner fully equal to the average American reports.

Notes of Recent Decisions.

Agent's Bond—Liability of Surety—*Hartford Fire Ins. Co. v. Moss.* Supreme Court of Tennessee. 5 Ins. L. J. 824. Where the agent for several months failed at the end of each month to pay over the sums collected; *Held*, that in the absence of any stipulation to that effect the company was not obliged to notify the surety at the expiration of any portion of the time of such failures, but might recover the whole sum.

Discharge of Board—Act of God.—*Scully v. Kirkpatrick.* Supreme Court of Penn. 79 Penn. St. Rep. 1. If the condition of a bond become impossible by the act of God, the obligation is discharged. 2. When the act to be performed is of a purely personal character, which can be done only by the party himself, the act of God, in producing sickness and insanity, as well as death, will excuse performance.

Evidence—Opinion as to Value of Services—How Given—Person Performing Services Competent to Give Opinion as to Value.—*Mercer v. Vose.* New York Court of Appeals. 14 Alb. L. J. 330. Opinion by Earl, J. In an action for services rendered, witnesses may give an opinion as to the value of the services from what they know of the services rendered, or upon a hypothetical case, containing some or all of the facts proved, and the person performing the services is competent to give an opinion as to their value.

Counter-Claim — Contract Debt can not be set up as in Action for Tort.—*Smith v. Hall.* New York Court of Appeals, 14 Alb. L. J. 330. Opinion by Rapallo, J. A complaint alleged that plaintiff pledged some town bonds with defendant to secure advances; that defendant converted the bonds to his own use, and refused to redeliver them when demanded. The answer set up that the bonds were pledged with power of sale, from the proceeds of which was to be paid antecedent indebtedness, and set up certain counter-claims arising on contract. The jury, on conflicting evidence, found that the bonds were pledged to secure advances only. *Held*, (1) that an offer by defendant to show that plaintiff was not then the owner of the suit, was properly excluded; (2) that the defendant was not entitled to set up as a counter-claim in this action an old indebtedness on contract of plaintiff to him.

Removal of Causes.—*Michigan Central R. R. v. Andes Ins. Co.* United States Circuit Court, Southern District of Ohio, 9 Chicago Leg. News, 34. Opinion by Swing, J. Where, in an action upon a policy of fire insurance, the defendant pleads the condition thereof, limiting the time within which suit must be brought, in bar, a reply becomes necessary to render the issue complete and the case ready for trial, and until the issue be thus completed, no term can be held to have passed at which the cause could have been tried, within the meaning of the third section of the act of Congress, approved March 3, 1875, where the application for the removal is made by the party not in default for the completion of the issue, and such application is in time, and the cause removed under the act referred to.

Contract — Condition Precedent — Pleading.—*Estabrook v. Omaha Hotel Co.* Supreme Court of Nebraska, 10 West. Jurist, 631. Opinion by Gantt, J. 1. In an action upon contract, the plaintiff must aver performance of all the conditions precedent in the contract to be performed on his part, in order to constitute a cause of action against the defendant, unless he states in his petition all the necessary averments which will take the case out of the general rule, and fix the defendant's liability without such full performance on his part. 2. If, in such case, the condition precedent in the contract has not been fully performed on the part of the plaintiff, the question whether the defendant has or has not waived his legal rights, and by his acts become estopped from denying his liability under the contract, is one of fact, which is alone within the province of the jury to determine upon the testimony, under proper instructions by the court defining what constitutes such waiver.

Negligence — Contributory — Question for Jury — Care Required of Boy Ten Years Old.—*Maher v. Central Park, N. & E. Riv. R. R.* New York Court of Appeals, 14 Alb. L. J. 330. Opinion by Miller, J. 1. It is not enough to authorize a nonsuit, in an action for injury by negligence, that the evidence would warrant a jury in finding that the plaintiff was negligent, and that his negligence contributed to the injury; but where it is in doubt, from the evidence, whether negligence is established, that question must be determined by the jury. 2. Plaintiff, a boy ten years of age, was about to take passage in defendant's horse car. After the car had stopped, he was directed by the

driver to get on at the front platform. While he was undertaking to do so, the driver struck the horses, which started the car with such force as to throw plaintiff to the ground, whereby he was injured. *Held*, (1) that plaintiff was bound to exercise only such care and prudence as might be reasonably expected from a person of his years; (2) that it was not negligence in itself to get on at the front platform; (3) that he was justified in following the directions of defendant's employee in the manner of entering the car.

Power of Court to Commit to School — Effect of Commitment—Authority of Parent.—*Milwaukee Industrial School v. Board of Supervisors.* Supreme Court of Wisconsin, 9 Chicago Leg. News, 41. 1. *Held*, that the courts have power to commit to this school children, because inmates of a poor-house, but that mayors, judges and magistrates have no such power. 2. That as to the children, the commitment is conclusive; as to the parent, of no binding force or effect; that "the rights of the parent to resume the care of his child in proper circumstances, should not be dependent on the discretion of the school officers." 3. That such schools are not to be regarded as prisons. 4. The court admits that "some of its views are inconsistent with the decision of the Supreme Court of Illinois, in People v. Turner, 55 Ill. 280," where it was held that an act providing for a reform school, etc., was unconstitutional.

Condemnation Proceedings—Right to Abandon—Mandamus. *City of Chicago v. Barbian.* Supreme Court of Ill. 9 C. L. N. Opinion by Schofield, J. 1. *Held*, that a *mandamus* will not be granted to compel the levy and collection of a tax for the payment of a sum ascertained and reported by a jury, and adjudged by a court of competent jurisdiction to be compensation for damages, to be sustained by the relator, to certain property, by reason of the widening of North State street, the city by ordinance, having, after the entry of the order in the condemnation proceedings, repealed the ordinance under which the proceedings for condemnation were had, and discontinued all further proceedings for making the improvement. 2. That although the judgment would draw interest, it is not absolute, but conditional, and the statute has provided for its enforcement only through the performance of the condition. An execution would not issue upon such a judgment.

Illegal Preferences in Bankruptcy.—*In re, Baker.* United States District Court, Northern District of New York. 14 Alb. L. J. 294. Opinion by Wallace, J. 1. A failing debtor may allow a friendly creditor to obtain a preference by means of legal process, if he does not actively participate therein, without violation of the bankrupt law. But if he actively participates and facilitates the seizure of his property, the preference is illegal. 2. A creditor having a claim against his brother which would absorb all the debtor's assets, brought action thereon. The brother thereafter continued to do business as usual, and to purchase goods on credit, and after the time to enter judgment in the action had elapsed, made statements to the agent of another creditor that led him to believe that no change had occurred in the debtor's circumstances. Judgment was not entered and execution issued until ten days after such steps might have been taken. *Held*, that there was sufficient evidence that a preference was intended, and that the debtor co-operated to secure that result, and the lien of the judgment and execution was not valid. 3. Slight *indicia* are sufficient to establish the fact of co-operation between debtor and creditor in such cases.

Legal News and Notes.

—The *Chicago Legal News* informs its readers, that the Central Law Journal has recently published the case of Sawyer v. Upton Assignee, as being a decision delivered in October, 1876, while in fact it was delivered in October, 1875. Although our contemporary must know that what Bellewe has termed "the Printer's recklefnes," sometimes surpasseth all understanding, and that the value of an able judgment can no more depend upon a figure, than the tenure of a man's estate, as Blackstone has remarked, should depend upon a comma, yet we are glad to be able to file a plea in bar to the declaration of our contemporary. No such case, as that named, has been published in this journal since its foundation.

—Powers of Attorney in Prosecuting before Treasury Department and Court of Claims.—The secretary of the treasury has issued the following order on the above subject (22 Int. Rev. Record, 333): "The order of the department of April 15, 1875, relating to powers of attorney, is hereby revoked, and the following adopted in lieu thereof: In every case to be finally adjudicated in this department, the attorney shall present a letter of attorney from the claimant to prosecute the case, and shall be regarded as the attorney in such case, with the right to receive any draft therein. The claimant may change his attorney at any time, with the consent of the proper officer of the department. In cases certified for payment by the Court of Claims, or by any commission created by Congress, the persons certified by said court or commission as the attorneys of record, shall be regarded as such by this department and shall be entitled to receive the drafts in such cases. In all cases drafts for claims will be made to the order of the claimant, and will be delivered to the proper attorney, according to this order. The secretary reserves the right in all cases to make such special orders as may be proper."

The Original Amount of a Note Altered by Chemicals can not be Recovered.—The supreme court has sent down a rescript in the case of Citizen's National Bank v. Richmond. This was a suit to recover on a note for $500, made by Lucius W. Pond, of Worcester. It appears that in August, 1875, Pond applied to the defendant to endorse the note, being a note for $500, and the defendant endorsed it for Pond's accommodation. Pond, thereupon, by the use of chemicals, rendered invisible the words "five hundred" and the figures "500," and wrote over them the words "two thousand" and the figures "2,000." Pond then procured the plaintiff's bank, in the ordinary course of business, to discount the note, and the bank did so, being entirely innocent of the fraud. Before this note became due, Pond was arrested and imprisoned for a large number of similar transactions. The plaintiff's bank, after the maturity of the note, applied to the writing, which set forth the amount for which the note was given, a solution of nutgalls, and this application revealed that the change had been made from $500 to $2,000. The defendant was present and did not object when the nutgall was applied. The note was demanded and protested as a note for $500 and not $2,000, the defendant was duly notified as an endorser by two notices, one treating the note as $500, and another as a note for $2,000. The case was tried in the Superior Court of Worcester county, and the court ruled that the plaintiff could not recover, and the plaintiff alleged exceptions. The supreme court has given judgment for the defendant, holding that "the defendant never made the note for $2,000, which was the only one that the plaintiff accepted."—[*Boston Herald.*

—In the New York Court of Com. Pleas last week, in the divorce case of Davis v. Davis, a marriage celebrated in the Indian territory by a half breed Chickasaw Indian, was held valid, on the following grounds, per Van Brunt, J.: "We had," he said, "decisions of the United States courts that the Indian nations were not foreign states, nor was the territory which they inhabit foreign. There were further decisions that they were not territories, and not states of the Union. They had been declared wards of the nation, and this was the only explanation given as to their relations to the states and the general government. Their legislation had no effect on the whites, and the certificate of marriage given to Mrs. Davis at the ceremony with Taylor, was entitled to no consideration, and properly excluded from the case. But if the Indian law did not apply to that marriage, what law did? No two persons could go to any part of the globe, inhabited or uninhabited, and enter into a contract without being subject to some law. What law? The common law applied only to England and colonies settled by her; the civil law to the Latin race, and the common law nowhere in Europe or America. These parties are presumed to have had in view the common law of the state from which they went, and that was the civil law, and in regard to the civil law, there was no authority for saying that the intervention of any person in holy orders was necessary to contract marriage; and, in consequence of these people being residents of Texas, and the civil law being the common law of that state, they must be regarded as having contracted in view of the law of the state from whence they came, and the civil law makes a ceremony of marriage entered into between the parties *per verbum de presenti*, a binding contract between those parties. Applying that rule to this case, it necessarily made the marriage in the Indian territory a binding and valid marriage, without subsequent cohabitation."

Ware's Valley Monthly.—The November number of this periodical commences the fourth volume. Its contents are varied and interesting, and compare favorably with the magazines of the Eastern states. While a publication should not be supported on account of local considerations alone, yet there should be no prejudice against any production because it has not the imprint of a well-known and old established house upon it. There is a very prevalent idea that the West and South can not issue anything worthy the patronage of educated people; and this is the difficulty which the *Valley Monthly* has had to contend against. However, we are glad to see that it has now got a fair footing, and that it enters upon its fourth volume with very flattering prospects. The present number is embellished with an excellent medallion portrait of Queen Victoria, and is accompanied by a short sketch of that benign ruler, somewhat fulsome, perhaps, but all Americans will readily admit with the writer that "in her the royalty of place and circumstance is so lost in that divine royalty of a sweet and gracious womanhood, that in the woman we forget the queen." A clever article on political economy is contributed by A. W. Alexander, in which he suggests that the word "*catallactics*" (a Greek derivative, meaning exchanges) would be the most comprehensive and appropriate name for that science. The difficulties of the Chinese question are succinctly set forth by C. P. Fitzgerald, of San Francisco. He says that the Chinaman's nature furnishes a poor moral basis for Christianity, on account of an effete idolatry having exterminated the sentiment of reverence. Bret Harte says his smile is "childlike and bland"—that is his chronic facial expression, but when he worships he becomes absolutely jolly. Among such a people one would hardly look for writers of the most exalted morality, yet the ethics of Confuscius are unsurpassed, except by those of the Great Master, and even this is denied by many; and there are very few treatises on woman's duty which are entitled to rank higher than the "Nuv Shun, or Instructions to Women," a review of which the *Valley Monthly* reprints from the *Pall Mall Budget*. There are two short articles from English writers—one of a comical nature on "Noses," and one on the Turko-Servian trouble. "My Utopia," by Mrs. M. B. Hoffman, is a sweet yet vigorous poem. Besides the articles mentioned above, there are many others, including continued stories, scientific, religious, literary and general editorial notes. The whole number is an intellectual treat, and should it be but a sample of those to follow, the *Valley Monthly* will deserve a wide and appreciative patronage. The publishers are Marcus J. Wright & Co., N. E. Corner of 5th and Chestnut Sts., St. Louis.